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WILCOX & CO

No. 9248

Vol 2167

United States Circuit Court of Appeals

For the Ninth Circuit.

CARNEGIE NATIONAL BANK, Successor to THE HANCHETT BOND COMPANY, a Corporation,

Appellant,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, a Corporation, HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased, FULTON COUNTY BANK OF McCONNELSBURG, Pa., a Corporation, and DR. LOUIS D. HYDE,

Appellees.

and

HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased,

Appellant,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation, CARNEGIE NATIONAL BANK, Successor to THE HANCHETT BOND COMPANY, a Corporation, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, FULTON COUNTY BANK OF McCONNELSBURG, PA., and DR. LOUIS D. HYDE,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9248

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

MARRON & FOOR,
Wolf Point, Montana,
Attorneys for Plaintiff.

FRANK M. CATLIN,
Wolf Point, Montana,

HURD, HALL & McCABE,
Great Falls, Montana.
Attorneys for Defendant City of Wolf Point.

ROBERT N. ERSKINE,
111 W. Monroe St., Chicago, Ill.

CHARLES GORDON,
Wolf Point, Montana.
Attorneys for Defendant Hazel Graham Glessner, as Executrix, et al. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 1583.

CARNEGIE NATIONAL BANK, Successor to the HANCHETT BOND COMPANY, a Corporation, and MINNIE LUEBBE,

Complainants,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation; PAYNE AVENUE STATE BANK of St. Paul, Minnesota, a corporation; JAMES G. GLEASSNER; FULTON COUNTY BANK of McConnelsburg, Pa., a corporation; and DR. LOUIS D. HYDE,

Defendants.

Be It Remembered, that on May 22, 1930, an Amended Complaint was filed herein, which is in the words and figures following, to wit: [2]

In the District Court of the United States for the District of Montana, Great Falls Division.

No. 1583

THE HANCHETT BOND COMPANY, A Corporation,

Complainant,

—versus—

CITY OF WOLF POINT, State of Montana, a Municipal Corporation; D. W. SCHREIBER; PAYNE AVENUE STATE BANK of St. Paul, Minnesota; A Corporation; JAMES G. GLEASSNER; FULTON COUNTY BANK of McConnelsburg, Pa., A Corporation; and DR. LOUIS D. HYDE,

Defendants.

AMENDED COMPLAINT

To The Honorable Charles N. Pray, Judge of the District Court of the United States, for the District of Montana, Sitting in Equity:

The Complainant brings this its amended complaint against hereinafter named Defendants and respectfully shows unto this Honorable court as follows:

1.

That the Complainant, The Hanchett Bond Company, is now and at all of the times hereinafter mentioned, has been, a corporation, duly organized, created and existing under and by virtue of the laws of the State of New Jersey, with its principal place

of business at 39 South LaSalle Street, Chicago, Illinois; and is not a resident of the State of Montana.

2.

That the Defendant, the City of Wolf Point, State of Montana, is an incorporated City of and located in the State of Montana, being a Municipal subdivision of the said State, and all other defendants hereinafter named are located in and residents of the several places respectively named.

3.

That the controversy in this suit is between citizens of different states, and that the matter and amount in dispute in [3] this cause exceeds the sum or value of Three Thousand Dollars ($3000.00) exclusive of interest and costs as will more fully appear by the allegations herein contained.

4.

That on or about to-wit: the 10th day of March, A. D. 1919, the said City of Wolf Point, Montana, a corporation, by and through its Council, passed and approved a Resolution finally ratifying and confirming the issuance of Bonds on account of and issued for the purpose of paying the cost of making special improvements and constructing sewer mains within and designated and described as Special Improvement District No. 12, in the sum of $37,966.53, bearing interest at the rate of six per cent per annum, a copy of which said Resolution is hereto

attached and by this reference made a part hereof and marked "Exhibit 1."

5.

That said bonds were issued by the said City of Wolf Point, Montana, a corporation numbered one to seventy-five inclusive and for the sum of $500.00 each, and were dated and delivered as follows, to-wit:

Bonds numbered 1 to 25 inclusive, dated October 9th, 1918;

Bonds numbered 26 to 54 inclusive, dated November 20, 1918;

Bonds numbered 55 to 85 inclusive, dated May 26, 1919,

that all of the said bonds matured on the first day of January, A. D. 1929, and that said bonds are identical in amount and date of maturity and are in the form indicated by Exhibit 2 attached hereto and made a part hereof, and that one bond for the sum of $466.53 was issued and paid forthwith by the said City of Wolf Point.

6

That all of the said bonds numbered from one to seventy-five inclusive were to be paid in their numerical order and callable for payment when there were funds on hand for the payment of the same, and that all of said bonds have been paid, excepting, however, bonds numbered 42 to 75 inclu-

sive, amounting to the total sum of $17,000.00, [4] which said bonds have matured and have become due and payable and now remain unpaid as to the full amount of the face value thereof, together with eight per cent. interest per annum thereon from the date of maturity, to-wit: January 1st, 1929, until fully paid; that certain of said bonds to-wit: numbered 42 to 49 inclusive, have heretofore been called for payment by said City on to-wit: May 24th, 1929; that certain of said bonds to-wit: numbered 50 to 52 inclusive, have heretofore been called for payment by said City on to-wit: July 13th, 1929; that certain of said bonds, to-wit: number 53 has heretofore been called for payment by said City on to-wit: January 18th, 1930, after the matturity thereof, but said City then refused to pay said bonds in full including interest on said bonds accruing.

7

That for the purpose of paying said bonds and the cost of said improvement, the City Council of the City of Wolf Point, Montana, by said resolution of March 10th, 1919, levied and assessed a special tax in the sum of $37,966.53 against all the property lying within the boundaries of said district therein and thereby declared to be specially benefitted by said improvements, the several lots, pieces and parcels of land described in said resolution being assessed the sums therein and thereby fixed and determined; that said assessment and the

sum so levied and assessed against each lot, piece and parcel of land was made payable in ten equal installments, with interest at the rate of 6% per annum from the date of said resolution until paid; and that by said resolution said assessments and the installments thereof with interest were declared to be an assessment fund, which was thereby irrevocably pledged to and for the payment of the above described bonds; all of which will more fully appear from the terms and provisions of said resolution, copy of which is hereto attached and by reference made a part hereof. [5]

8

That in accordance with the provisions of law the first installment of the assessment became due and payable during the month of November, 1919, and said installment was in fact put into collection by the said City of Wolf Point, through the County Treasurer of the County of Roosevelt, State of Montana; that the second and succeeding installments of the assessments became due and payable in the month of November in each of the years 1919 to November 30th, 1928, inclusive, and said several installments of the assessment were in fact similarly put into collection by the City in each of said several years last aforesaid; that in each of said several years the said City Treasurer of the said City of Wolf Point by and through the said County Treasurer of the County of Roosevelt, State of Montana, has received payment of portions of

said assessment and the several installments of the assessment thereof with interest from the owners of the property, as levied and assessed and such funds have come into the possession of said City; that from time to time there has been certified delinquent certain lots, pieces and parcels of land assessed as aforesaid, the said installments of the assessment whereof were not paid as required by law; that the said County Treasurer did from time to time collect certain of said assessments thereof that had become delinquent and paid the same to the said City Treasurer of the said City of Wolf Point; but your Complainant is informed and believes and so states the fact to be that some portion of said assessment thereof have not been collected either by the said City Treasurer or by the said County Treasurer, and still remain unpaid. [6]

9

That from time to time there has come into the hands of the said City of Wolf Point and of the said City Treasurer from the said County Treasurer, from collections made by them as aforesaid, large sums of money, the exact amount of which your *complaint* is unable to ascertain and determine; nor is your complainant able by an examination of the records of said City to determine how much of said moneys so collected or how much of the principal and interest as to each of the several installments of the assessment of Special Improvement District No. 12, have come into the hands of the said City Treasurer, of said City; but

your complainant states on its information and belief that there has been paid by the owners of property assessed as aforesaid for said improvements on account of the bonds issued and delivered on Special Improvement District No. 12, the sum of approximately to-wit: $43069.93, including principal and interest, but the exact amount thereof and the amount received by the said City on the annual installments thereof and the amount received as interest, as well as the times when said owners of property have paid one or more of the said installments, your complainant is unable to fully ascertain and determine; all of which funds your complainant states should have been received, held and used by the City of Wolf Point, and its Treasurer for the purposes of said Improvement District No. 12 and the payment of said bonds and interest thereon.

10

That the said City of Wolf Point and its officers and agents in such behalf, particularly the City Treasurer by and through the County Treasurer, are charged by law with the duty [7] of collecting the assessments of said Special Improvement District No. 12, and the said City and the City Treasurer are charged by law with the duty of distributing and paying out such assessment fund of and from said Special Improvement District No. 12; and said City and the Treasurer thereof are trustees of such assessment fund for the use and benefit of the owners and holders of the

said bonds and the interest coupons therefrom, and as such trustees are charged with the duty to collect, hold and pay out all of such funds in manner required by law, and to pay the funds collected from each of the several annual installments of Special Improvement District No. 12, together with the interest collected therewith, upon the bonds and interest coupons respectively issued against and payable out of the several annual installments in each of the several years as and when such bonds and coupons were callable and for which such assessments thereof were assessed, levied and collected.

11

That it became and was the duty of said City of Wolf Point and its said officials to pay out the funds, which from time to time should be collected by it from the several annual installments of Special Improvement District No. 12, by calling the bonds issued against the said District; but your complainant says that although there has been collected and come into the hands of such City and its officials the gross sum of approximately to-wit: $43069.93, applicable to the payment of said bonds and interest coupons, nevertheless said City and its Treasurer have paid out and diverted certain

of said funds belonging to said District for other purposes, among them being as follows, to-wit: [8]

October 31, 1921, paid on auditing expense $100.00;

November 30, 1921, transferred by Ordinance #100 to the contingency fund $522.55;

January, 1922, credited to Special Improvement District No. 10..... $300.00;

April 30, 1922, transferred funds to suspense, water and general funds of said city $962.89;

and your complainant upon its information and belief now charges and avers the facts to be that the said City has not repaid the said funds so paid out and diverted together with interest thereon from the times of such diversion to the said Special Improvement District No. 12, and that other funds and money so collected for said District have been misappropriated and misapplied to purposes and in a manner to your complainant unknown without repayments thereof, which said funds and money so collected were properly payable only upon the bonds and interest coupons issued against said District, and that the total amount of the bonds and interest coupons therefrom in fact paid by said City and the City Treasurer is substantially less than the total amount of said assessment with interest which has been collected.

12

That your complainant further alleges upon its information and belief, and so states the facts to be, that the said City and its said officials have collected large sums of money belonging to the said District and have held the same for long periods of time, failing and neglecting to call bonds pursuant to the Statutes of the State of Montana in cases made and provided, thereby allowing and permitting interest to accumulate on said callable bonds; and from time to time such accumulated funds have been used to pay interest coupons which would not have matured if bonds had been called as required by law; which failure, negligence and misapplication of funds of and by the said City and its officials and agents did deplete and reduce the total gross assessment fund of said District applicable [9] only and irrevocably pledged to the payment of the said bonds.

13

That certain installments of the assessment of said District as against particular pieces or parcels of land assessed for said District, have not been paid when due, so that the gross amount of the assessment so levied as hereinbefore set forth has not been collected and received by the said City, its officers and agents; and your complainant alleges that the said City, its officers and agents have failed, neglected and refused by proper action

upon such default in payment of certain installments to declare said delinquent installments together with the remaining installments of assessment of said District against those certain pieces or parcels of land so delinquent immediately due and payable in manner as required by law, but have permitted the special assessments and the general taxes levied and assessed against said pieces or parcels of land to accumulate for a long period of time; and that the said lands have been sold at tax sales from year to year and the title thereto vested in the County of Roosevelt, State of Montana, and all of the right, title and interest in and to the said lands by virtue of the assessment of the said District has been forever lost as security for the payment of the said bonds; and that the said City has further failed, neglected and refused to perform its duty by taking any action in the premises whatsoever so that the bonds set forth and described in paragraph 6 hereof have remained unpaid for many years last past.

14

That said City in levying and assessing the sum of $37,966.53, being an amount exactly the same as the amount of bonds issued, failed to make any provision for interest which had accumulated upon the said bonds from the date thereof to the date of the resolution levying said assessment from which date interest accrued [10] on the assessment;

and said City also failed to make any provision for the interest from time to time accruing, upon bonds subject to call by reason of collection of the several installments of the assessments and portions thereof, during the period between the time of payment of assessments by the respective owners of property and the time when such bonds were in fact called and paid; that the assessment so levied in the amount of $37,966.53 and the interest thereon was inadequate and insufficient to pay all of the bonds so provided as aforesaid to be issued with interest thereon; but said City and the City Treasurer nevertheless paid in full the interest coupons first maturing representing interest from the date of said bonds, and have also paid in full all other interest coupons from time to time maturing and have paid the bonds heretofore called for payment in full with interest to the date of call and payment, and by reason of such payments said assessment fund has been depleted and reduced so that said city has been unable to pay a large number of bonds and has not paid bonds in the same proportion to the total amount of bonds issued, which the amount of the assessment heretofore in fact collected bears to the total assessment levied and assessed; by means whereof and by reason of the failure of said City and the City Treasurer in the performance of the duty owed by them as trustees for and in behalf of the owners and holders of said bonds, the complainant herein has been prevented from collecting and receiving payment of its said bonds.

That, as this complainant is informed and believes, the respective installments due and payable from certain lots, pieces and parcels of land in the several years from November 1919 to November 1928 inclusive were not paid when due, and have not been paid from thence hitherto, but such lots, pieces and parcels of land have continued in default and from year to year have been sold at tax [11] sale and title thereto vested in the County of Roosevelt of the State of Montana; and said City has been put on notice of such facts by reason of not receiving the full amount of the installments with interest from time to time due and payable; that said City has levied other assessments in large amounts upon the same lots, pieces and parcels of land assessed for special Improvement District No. 12 and certain of which lots, pieces and parcels of land have likewise defaulted payment of such other assessments and installments thereof and have likewise defaulted payment of such other assessments and installments thereof and have defaulted payment of the general taxes levied and assessed thereon; and that the total amounts so levied and assessed, and which have become due and payable from such lots, pieces and parcels of land have far exceeded the value thereof so that the County of Roosevelt of the State of Montana has been unable to sell such lands for an amount equal to or ap-

proaching such accumulated taxes and assessments; that the action of said City in continuing the levying of assessments beyond the value of the respective lots, pieces and parcels of land constitutes a breach of the duty which said City owed as a trustee for and in behalf of the owners and holders of the bonds of Special Improvement District #12, and said City having had and received the benefit of said improvements should now be compelled to make restitution on account of such breach of duty to the extent that complainant and other holders of bonds have been damaged thereby.

16

That the said City and City Treasurer have further failed in their duty as trustees as aforesaid in that, with knowledge of the fact that all assessments were not being collected for the reasons aforesaid, so that all bonds could not be paid out [12] of the assessment fund, they nevertheless failed to apportion, divide and make payment of the assessment fund from time to time collected and received by equitable distribution among and on account of the several bonds outstanding and unpaid, but on the contrary said City and the City Treasurer continued to pay interest coupons in full and to call and pay bonds of the lowest number to the prejudice of complainant and other holders of bonds of higher number.

17

That complainant herein is now the owner of certain of said bonds above described to-wit: Bonds numbered 45 to 58 inclusive and number 75 of the aggregate face value of $7,500.00, which bonds are now past due and unpaid and which amount has been due and owing to the complainant herein since to-wit: January 1, 1929, with interest from that date in accordance with the law of Montana at the rate of 8% per annum; and that all of said bonds so owned by the complainant herein (except perhaps bond #75) might and should have been called and paid on or before the date of the maturity thereof except that said City and the City Treasurer thereof have failed, neglected and refused to perform their duties as trustees by collecting, and in due course from time to time keeping said assessment fund intact and available to the payment of said bonds, and calling and paying said bonds in accordance with the requirements of the law of Montana;

18

That complainant further states that the remainder of said bonds not so owned and held by complainant are numbered and owned, as your complainant is informed and believes, by the following

named persons, all of whom are now made parties defendant hereto, namely: [13]

	Bonds Numbered,
A. W. Schreiber, Carnegie, Pennsylvania	42, 43, and 44;
Payne Avenue State Bank, St. Paul, Minn.	59, to 66 Incl.
James G. Gleassner, York, Pennsylvania	67 and 74,
Fulton County Bank, McConnelsburg, Pa.	68 to 72 incl.
Dr. Louis D. Hyde, Owedo, New York	73.

that all of said persons have and claim some right, title and interest in and to said assessment fund created and established for the payment of all of the bonds of said Special Improvement District No. 12, and that the interest of said persons should now be determined and established as a part of the equitable administration of such trust funds.

19

That the said City of Wolf Point, Montana, in making said assessment for the purpose of paying such bonds and in levying and assessing the several amounts and the installments thereof against the several lots, pieces and parcels of land benefited by said improvement and by irrevocably pledging such assessment fund created thereby, did thereby become a trustee of such assessment fund for the

equal and proportionate benefit of all holders of such bonds issued as aforesaid, with all the duties and obligations applicable under established principles of equity to any person receiving, holding and administering trust funds; and said City should now be required to make a full, true and just accounting of all moneys received and disbursed on account of the assessments of Special Improvement District No. 12; and said City should be required to pay all moneys which may be found due and owing from said City upon such accounting to the persons who may have an interest in and who may be equitably entitled under the law to any part of such trust funds, or unto said assessment fund for [14] the benefit of the holders of bonds of said Special Improvement District No. 12; and said City should be required to do and perform all of those acts for the proper protection of the holders of such bonds which may be required by, under and pursuant to the laws applicable thereto, or by their duty and obligation of a Trustee to the beneficiaries of such trust.

20

That said City has failed in its duties and obligation as a trustee and by reason thereof and by reason, among other things, of the misapplication and diversion of funds, the preference of some bondholders over others, the failure to prorate the assessment fund and to pay interest coupons with interest money, and to pay bonds with the principal

of said assessment, said City of Wolf Point has become and is directly and generally liable to the complainant herein as a beneficiary of such trust funds for the use and benefit of all parties in interest therein.

For as much, therefore, as your complainant is without adequate remedy in the premises except in a court of equity, therefore your complainant prays:

(1) That a subpoena may issue out of this Honorable Court directed to the defendants, the City of Wolf Point, a municipal corporation, D. W. Schreiber, Payne Avenue State Bank, James G. Gleassner, Fulton County Bank, and Dr. Louis D. Hyde, requiring and commanding them and each of them to appear in this cause upon a day certain and to answer the several allegations in this Bill of Complaint contained, but not under oath, answer under oath being hereby expressly waived.

[15]

(2) That a full, true and just accounting may be made of all the moneys collected and received by and in behalf of said City of Wolf Point of and from the special assessment levied for special Improvement District No. 12, and of the disbursements therefrom and of the proportionate and respective amounts based upon collections applicable to the bonds respectively issued against said assessments.

(3) That the defendant, City of Wolf Point may be decreed to pay to your Complainant what,

if anything, upon the taking of such account shall appear to be due to complainant upon the bonds held by Complainant issued against said Special Improvement District No. 12 or in the alternative that said City of Wolf Point be decreed to reimburse and pay into the assessment fund created for said Special Improvement District No. 12 whatever amount shall appear to be due and owing thereto, for the use and benefit of all parties in interest therein.

(4) That the rights of this Complainant and of the several defendants owning bonds of said Special Improvement District No. 12 in and to said assessment fund out of which said bonds are payable may be determined and payments directed to be made to this Complainant and said defendants as equity may require.

(5) That the said City of Wolf Point may and shall be required by the mandate and order of this court to make payment of any amount which shall be found to be due either to your Complainant or to the assessment fund of Special Improvement District No. 12, for the use and benefit of all parties in interest therein, by the appropriation of funds and levy of taxes for such purpose and the passage or taking of any and all necessary ordinances and proceedings from time to time required to that end; and that said [16] City may be further required by the mandate and order of this Court to collect, receive and hold all moneys and

fund appropriated, levied and collected for the purpose of paying the amount which may be found due to your Complainant or to said assessment fund and to pay such funds in accordance with the judgment and decree of this court.

(6) That the said City of Wolf Point shall likewise be required by the mandate and order of this Court to receive and hold any funds which may be hereafter collected as the proceeds of the assessments upon property for said Special Improvement District No. 12 and to pay such funds to your Complainant as its interest therein may appear or into said assessment fund of Special Improvement District No. 12 for the use and benefit of all parties in interest therein.

(7) That the City of Wolf Point may be required to do and perform all of those acts required by law and by their duty as trustees for the use and benefit of the several parties in interest.

(8) And that your Complainant may have such other and further relief in the premises as equity may require and to this Honorable Court shall seem meet.

And your Complainant will ever pray.

MARRON & FOOR,
By ARLIE M. FOOR,
Its Solicitors.

[Endorsed]: Filed May 22, 1930. [17]

Thereafter, on September 2, 1930, Separate Answer of defendant City of Wolf Point, Montana, was filed herein, which is in the words and figures following, to-wit: [18]

[Title of District Court and Cause.]

SEPARATE ANSWER OF DEFENDANT, CITY OF WOLF POINT.

Comes now the above named defendant, City of Wolf Point, State of Montana, and for its separate answer to the amended complaint of plaintiff on file herein admits, denies and alleges as follows:

I.

Admits the allegations set forth and contained in paragraph I of said amended complaint.

II.

Admits the allegations set forth and contained in paragraph II of said amended complaint.

III.

Admits the allegations set forth and contained in paragraph III of said amended complaint.

IV.

Admits the allegations set forth and contained in paragraph IV of said amended complaint. [19]

V.

Admits the allegations set forth and contained in paragraph V of said amended complaint.

VI.

Denies that all of said bonds, numbered from 1 to 75 inclusive were to be paid in their numerical order and alleges that said bonds were and are payable in the order of their registration; admits that said bonds were callable for payment when there were funds on hand for the payment of the same, and that all of said bonds have been paid except bonds numbered 42 to 75 inclusive, amounting to a total of $17,000.00, which said bonds have matured; admits that on May 24th, 1929, bonds numbered 42 to 49 were called for payment by said City; that on July 13th, 1929, bonds 50 and 52 were called for payment; that on January 18th, 1930, bond 53 was called for payment. Specifically denies each and every other matter, fact and thing alleged and contained in said paragraph.

VII.

Admits the allegations set forth and contained in paragraph VII of said amended complaint.

VIII.

Admits the allegations set forth and contained in paragraph VII of said amended complaint. Further answering said paragraph defendant alleges that during the years 1919 to 1928 inclusive, installment assessments made under said resolution became delinquent and that by reason of said delinquency defendant has been unable and is now unable to collect installment assessments upon the

property included in said District amounting to the sum of $7890.08 with interest and penalties as more fully appears from Exhibit "A", attached hereto and by this reference made a part hereof.

IX.

Admits that there has come into the hands of the [20] said City of Wolf Point and of the City Treasurer from collections made upon installments assessments upon the property in said District the sum of $48,873.15, including principal, interest and penalties, all of which funds have been and are held by the City of Wolf Point and its Treasurer for the purposes of said Improvement District No. 12 and the payment of said bonds and interest thereon. Specifically denies each and every other matter, fact and thing alleged and contained in said paragraph.

X.

Admits that the City Treasurer is charged by law with the duty of collecting the assessments of said special Improvement District No. 12 by and through the County Treasurer; and with the duty of distributing and paying out such assessment fund of and from said special Improvement District No. 12; admits that said City Treasurer is charged with the duty to collect, hold and pay out all of such funds in the manner required by law, and to pay the funds collected from each of the several annual installments of special Improvement District No. 12, together with interest collected therewith

upon the bonds for which such assessments were assessed, levied and collected. Specifically denies each and every other matter, fact and thing alleged and contained in said paragraph.

XI.

Admits that it was the duty of the City Treasurer of Wolf Point, Montana, to pay out the funds which from time to time should be collected by it from the several annual installments of Special Improvement District No. 12 by calling the bonds issued against said District; admits that there has been collected and come into the hands of the City Treasurer the sum of $48,873.15 applicable to the payment of said bonds and interest; denies that said City or its Treasurer have paid out or diverted certain or any of said funds belonging to said District for [21] other purposes or for the purposes set forth in said paragraph or otherwise or at all; denies that the City Treasurer and said City have not repaid to said Special Improvement District No. 12 any and all funds paid out or diverted; denies that any sum or sums or funds or money collected for said District other than as specifically set forth in said paragraph have been misappropriated or diverted, without repayments thereof, or otherwise or at all; admits that the total amount of the bonds and interest coupons paid by the City Treasurer is less than the total amount of said assessment with interest which has been collected; alleges that there has been collected the sum of

$48,873.15; that there has been paid out upon the principal and interest of said bonds the sum of $42,199.81 and that there is a balance on hand applicable to the payment of said bonds and interest the sum of $6,273.34.

XII.

Denies that said City or its officials have collected large or any sums of money belonging to said District and have held the same for long or any periods of time, or have failed or neglected to call bonds pursuant to the Statutes of the State of Montana or otherwise, or have allowed or permitted interest to accumulate on callable bonds; denies that accumulated or other funds have been used to pay interest coupons which would not have matured if bonds had been called as required by law, or otherwise; denies that said City or its officials or agents failed, neglected or misapplied any funds of said District so that the gross assessment fund of said District was depleted or reduced or otherwise.

XIII.

Admits that installments of the assessment of said District as against particular pieces and parcels of land included in said District have not been paid when due; alleges [22] that the correct amount of such delinquent and unpaid taxes is shown upon Exhibit "A" to this answer; denies that defendant or its officers or agents have failed or neglected or

refused by proper or other action upon such default in payment of certain installments to declare said delinquent installments together with the remaining installments of assessment of said District against those certain pieces or parcels of land so delinquent immediately due and payable as required by law or otherwise; denies that defendant or its officials or agents have permitted said special assessments and the general taxes levied and assessed against said pieces of land to accumulate for a long or any period of time; admits that various pieces of land included in said District have been sold at tax sales and the title thereto vested in Roosevelt County, Montana, and all right, title and interest in and to said lands forever lost as security for the payment of said bonds. Specifically denies each and every other matter, fact and thing alleged and contained in paragraph 13.

XIV.

Denies that defendant in levying or assessing the sum of $37,966.53, failed to make any provision for interest which had accumulated upon the said bonds from the date thereof to the date of the resolution levying said assessment or otherwise; denies that defendant failed to make any provision for the interest from time to time accruing, upon bonds subject to call by reason of collection of the several installments of the assessments and portions thereof or otherwise, during the period between the time of payment of assessments by the

respective owners of property and the time when such bonds were in fact called and paid, or otherwise; denies that the assessment levied by said City was inadequate or insufficient to pay all of the bonds so provided to be issued with interest; admits that the City Treasurer paid in full the interest coupons first maturing [23] representing interest from the date of said bonds, and has also paid in full all other interest coupons from time to time maturing and has paid the bonds heretofore called for payment in full with interest to the date of call and payment; denies that by reason of such payments said assessment fund has been depleted or reduced so that defendant has been unable to pay a large number of bonds or otherwise; denies that defendant has not paid bonds in the same proportion to the total amount of bonds issued which the amount of the assessment heretofore in fact collected bears to the total assessment levied and assessed by means whereof or otherwise or by reason of any failure on the part of defendant or the City Treasurer in the performance of any duty owed by them as trustees or otherwise for or in behalf of the owners or holders of said bonds, or otherwise, complainant has been prevented from collecting or receiving payment of its said bonds.

XV.

Denies that the total amounts levied and assessed against the lands included in said District have exceeded the value thereof so that the County of

Roosevelt has been unable to sell such lands for an amount equal to or approaching such accumulated taxes and assessments or otherwise; denies that the action of said City in continuing the levying of assessments beyond the value of the respective lots, pieces and parcels of land constitutes a breach of any duty owing by it as trustee or otherwise for and in behalf of the owners and holders of the bonds of Special Improvement District No. 12; denies that said City for any reason whatsoever should be compelled to make restitution on account of any breach of duty or otherwise to any extent whatsoever. Admits each and every other allegation set forth and contained in paragraph 15. [24]

XVI.

Denies that said City or said City Treasurer have failed in their duty as trustees or otherwise in that with knowledge or otherwise, of the fact that all assessments were not being collected for the reasons set forth in said bill or otherwise, so that all bonds could not be paid out of the assessment fund or otherwise, they failed to apportion, or divide or make payment of the assessment fund from time to time collected and received by equitable distribution or otherwise, among or on account of the several bonds outstanding or unpaid, or otherwise; admits that said City Treasurer continued to pay interest coupons in full and to call and pay bonds of the lowest number. Denies each and every other

matter, fact and thing alleged and contained in said paragraph.

XVII.

Denies that it has any knowledge or information as to whether complainant is now the owner of bonds numbered 45 to 58 inclusive and number 75. Admits that said bonds are past due and unpaid; denies that all or any of said bonds might or should have been called or paid on or before the maturity thereof; denies that such non-payment was by reason of any failure, neglect or refusal on the part of defendant or said City Treasurer to perform their or either of their duties as trustees as set forth in said paragraph or otherwise or at all.

XVIII.

Denies that it has any knowledge or information as to the matters set forth and contained in paragraph 18 and therefore denies the same.

XIX.

Denies that said defendant, in making said assessment for the purpose of paying such bonds, or otherwise, or in levying or assessing the several amounts or the installments thereof [25] against the several lots, pieces and parcels of land benefited by said improvement, or by irrevocably pledging such assessment fund created thereby, or otherwise or at all did thereby or otherwise become a trustee of such assessment fund for the equal or proportionate benefit of all or any holders of such

bonds issued as aforesaid, or otherwise; denies that by reason of the facts alleged or otherwise defendant became charged with all or any of the duties or obligations applicable under the established or other principles of equity, to any person receiving, holding or administering trust funds or otherwise; denies that any accounting whatsoever is required of the moneys received or disbursed on account of the assessments of Special Improvement District No. 12; denies each and every other matter, fact and thing alleged in said paragraph 19.

XX.

Denies that defendant has misapplied or diverted said or any funds to which complainant is entitled or otherwise; denies that by reason of any matters alleged in paragraph 20, or otherwise or at all, defendant is liable to complainant as a beneficiary of trust funds or otherwise or at all.

Wherefore, having fully answered the complaint of plaintiff on file herein defendant prays that complainant take nothing by its complaint and that defendant be dismissed hence with its costs.

FRANK M. CATLIN
Wolf Point, Montana.
GEORGE E. HURD
H. C. HALL
E. J. McCABE
Great Falls, Montana.
Solicitors for Defendant,
City of Wolf Point. [26]

The defendant, City of Wolf Point, consents that service of papers herein may be made upon the firm of Hurd, Hall & McCabe, Great Falls, Montana.

FRANK M. CATLIN
GEORGE E. HURD
H. C. HALL
E. J. McCABE
Solicitors for Defendant.

[Endorsed]: Filed Sept. 2, 1930. [27]

Thereafter, on November 17, 1930, Order referring cause to Special Master, was duly filed and entered, being in the words and figures following, to-wit: [28]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard on written motion of the Complainant herein for a reference of this cause to a Master in Chancery, and the Court having examined said motion and also the Bill of Complaint and Answer thereto, and now being fully advised in the premises:

Therefore, it is ordered that this cause be and the same is hereby referred to G. G. Harris, of Great Falls, Montana, an Attorney of this Court, as a Special Master in Chancery, who shall fix a time or times and place in the City of Wolf Point,

Montana, at which he shall hear and receive the evidence of all parties hereto offered in support of the Bill of Complaint and Answers thereto; and he shall cause to be brought before him all witnesses and records by subpoena as required by any of the parties hereto; and he shall cause the testimony of the witnesses to be reduced to writing, which with all documentary evidence, shall be set forth in a complete transcript of all of the evidence; and said Master shall thereupon return his report upon such evidence, together with his recommendations upon the law and the facts, to this Court within a reasonable time hereafter.

Dated this 17th day of November, A. D. 1930.

CHAS. N. PRAY,

Judge.

[Endorsed]: Filed and Ent. Nov. 17, 1930. [29]

Thereafter, on November 17, 1930, Order for Service on absent defendants was duly filed and entered herein, being in the words and figures following, to-wit: [30]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard upon the Petition of the complainant herein, and the court having examined said Petition and the Bill of Com-

plaint herein, and having heard the arguments of counsel and being now fully advised in the premises:

Therefore, it is now found and determined by the court that the complainant herein by the allegations of its Bill of Complaint seeks an accounting of, and a determination of the rights and obligations of the complainant and certain defendants as beneficiaries in and to, a certain trust fund and trust property consisting of assessments levied upon certain lands within the said City of Wolf Point, a defendant herein, and the proceeds therefrom and the lien of said assessments upon and against said lands; and it appears from said Bill of Complaint that the suit is brought by the complainant to enforce an alleged legal and equitable lien upon or claim to real and personal property within the Montana District of the United States District Court, consisting of the said assessments and the proceeds therefrom and the lien thereof upon and against said lands; that it further appears from said Bill of Complaint that certain persons made defendants thereto are also [31] the owners of certain bonds and beneficially interested with complainant in said assessments, proceeds, and lien; that all said parties are necessary and proper parties hereto.

Therefore, it is ordered that the said defendants A. W. Schreiber, Payne Avenue State Bank, James G. Gleassner, Fulton County Bank and Dr. Louis

D. Hyde shall appear, plead, answer or demur to the Bill of Complaint herein on or before the seventh day of January, A. D. 1931.

And it is further ordered that unless said defendants voluntarily appear herein, then the Clerk of this court shall issue a subpoena directed to the Marshals of the districts in which said several defendants reside and such subpoenas together with a certified copy of this order shall be sent to such Marshals with directions to serve the same upon said defendants not less than twenty (20) days prior to the said seventh day of January, A. D. 1931 and to make return thereon on or before said date.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and Entered Nov. 17, 1930. [32]

Thereafter, on January 12, 1931,

ANSWER OF DEFENDANTS PAYNE AVENUE STATE BANK, ET AL,

was duly filed herein, being in the words and figures following, to-wit: [33]

[Title of District Court and Cause.]

Now come Payne Avenue State Bank, James C. Gleassner, Fulton County Bank and Dr. Louis D. Hyde, as defendants to the Amended Bill of Com-

plaint herein and make this their joint and several answers thereto as follows:

These defendants now expressly say that they are respectively residents and citizens of the cities and states indicated after their names, and that they are respectively the owners and holders of those bonds of the City of Wolf Point issued for Special Assessment District #12 more particularly described in the Amended Bill of Complaint as follows:

Name	Bond Numbers
Payne Avenue State Bank, St. Paul, Minn.	59 to 66 Incl.
James G. Gleassner, York, Pennsylvania	67 and 74
Fulton County Bank, McConnelsburg, Pa.	68 to 72 Incl.
Dr. Louis D. Hyde, Owedo, New York	73

and these defendants now seek the aid and protection of this Court of Equity in these proceedings as beneficiaries of the trust fund and property herein sought to be administered and of which an accounting is sought.

These defendants answering the amended bill of complaint and all paragraphs thereof now admit each and all the several allegations of fact and law contained therein and in each and all the several paragraphs thereof, [34] with the exceptions and distinctions hereinafter specifically set forth,

and now join in the prayer for relief as equity may require;

These defendants further answering say that they deny that it became and was the duty of the City of Wolf Point and of the Treasurer thereof to call and pay in full any bonds out of the assessment fund from and after the time when any installment of the assessment was not paid in full; and these defendants say that the first installment of said assessment and likewise the second and succeeding installments, together with interest payable therewith, as to certain lots, pieces and parcels of land were not paid when due and have not since been paid, and the City of Wolf Point was thereupon and thereby placed on notice that the full amount of said assessment fund and of the respective installments were not in fact being collected and that the full amount of bonds as to each installment could not be paid so long as such shortage continued, and thereupon it became and was the duty of said City and the Treasurer thereof as Trustees for and in behalf of the holders of all bonds to hold, distribute and pay out the assessment fund for the equal and proportionate benefit of all such holders without preference or priority of one bond over any other bonds of the respective installments;

These defendants further answering say that the total assessment levied and the several portions thereof as against the several lots, pieces and parcels of land were in a fixed and definite amount aggregating $37,066.53, against which bonds to the

same amount were issued, and that the proceeds therefrom constituted a fund solely applicable to payment of the principal amount of said bonds; that said assessment and the portion thereof from each lot, piece and parcel of land bore interest payable annually and such interest constituted a fund when collected applicable solely to payment of the interest coupons attached to said bonds; that it became and was the duty of said City and its Treasurer to keep each of said funds for principal and for interest separate and apart without commingling for any purpose and to hold, distribute and pay out such funds equally among the holders of the respective bonds and coupons; but these defendants say that said City and its Treasurer in disregard of their said duty did in fact use a part of such principal fund in [35] payment of interest coupons, and has paid all interest coupons in full and certain bonds in full when the respective funds applicable to said bonds and coupons were insufficient by reason of defaults in payment of assessments to permit of such payments, and said payments constitute a diversion and misapplication of trust funds to the damage of these defendants.

These defendants further answering deny that the bonds of complainant or any of them, or any other bonds, might and should have been called and paid on or before the date of the maturity thereof, or at any time, but these defendants say that all bonds and the interest coupons therefrom should be paid only in the proportion which the

amount of the several installments of the assessment actually collected bears to the whole of the respective installment of said assessment as levied; and these defendants further say that the provisions of the Montana Statutes relating to the levy of assessments provide for the division and collection thereof in equal annual installments, and such provisions are to be read and construed in conjunction with those further provisions relating to payment of bonds and interest coupons; that the assessment herein involved was payable in ten equal installments, that bonds were issued in exactly the amount of the assessment, and said bonds accordingly were issued against and payable out of the respective installments; that those provisions of the statutes providing for the call of bonds for payment relate to and are to be construed only as a fixing of the time for payment and not as creating or establishing a priority of one bond over any other bond except only to the extent that the funds collected as one installment of the assessment are then proportionately applicable to the bonds payable from such installment when called for payment;

These defendants further answering deny that the lien of said assessments and all right, title and interest in and to the lands assessed, has been lost as security for the payment of said bonds by reason of the County of Roosevelt taking title of said lands; but these defendants say that said assessments were duly levied in accordance with the provisions of law for the purpose of providing

for the payment of said bonds and thereupon became liens upon and against the lands assessed in favor of the City of [36] Wolf Point as a trustee for the use and benefit of all bonds and the holders thereof; that such assessments and the lien thereof constitute property held by the City as Trustee for bondholders, including these defendants, and such lien continues until payment in full of said bonds and is not subject to be divested, lost or in any manner terminated until such assessments are paid or the said bonds be fully satisfied; and these defendants further say that any attempt to take or any claim to said lands by tax deed or otherwise, free and clear of the lien of the assessments out of which the bonds of these defendants are payable, would constitute a taking of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States, and further would constitute an impairment of the contract between the City of Wolf Point and these defendants contrary to and in violation of Section 10 of Article I of the Constitution of the United States forbidding the impairment of the obligation of contracts, and these defendants now expressly plead said provisions of the Constitution of the United States in support of their rights under said bonds of the City of Wolf Point now held by these defendants.

Wherefore, these defendants now pray the same advantage herein as though they had been complainants and that all rights and equities of these

defendants as bondholders may be ascertained and adjudicated herein with reference to the trust funds and trust property constituting the subject matter of the Bill of Complaint herein; and these defendants pray the consideration of this court of equity for the enforcement and administration of the trust created and established by law in favor of the holders of the special assessment bonds issued by the defendant, City of Wolf Point; and these defendants pray that said City may be compelled to reimburse the trust funds for any amounts diverted or misapplied therefrom and for all losses thereto by fault of said City, and to pay to these defendants whatever proportion and amounts may be found due and owing to these complainants out of such trust funds; and these defendants will ever pray for the protection and aid of the Court of Equity.

PAYNE AVENUE STATE BANK,
JAMES G. GLASSNER,
FULTON COUNTY BANK,
DR. LOUIS D. HYDE,
Defendants.

By ROBERT N. ERSKINE,
Their Solicitor. [37]

Solicitor for defendants:
ROBERT N. ERSKINE,
111 W. Monroe St.,
Chicago.
CHARLES GORDON,
Wolf Point, Montana.

[Endorsed]: Received Jan. 8, 1931 and held for fee. Filed Jan. 12, 1931. [38]

Thereafter, on November 12, 1932, Report of Special Master, and Recommendations, were duly filed herein, being in the words and figures following, to-wit: [39]

[Title of District Court and Cause.]

REPORT OF SPECIAL MASTER AND RECOMMENDATIONS

This case was filed in this Court on or about the 3rd day of April, 1930, and involves moneys due on bonds issued by the City of Wolf Point on account of sewer construction work done in a special improvement district created by the city.

It appears from the pleadings that the suit involved four hundred lots in the city, and that the fund was to be raised to meet the bond issue by collection of ten annual assessments on these lots, commencing with the year 1919 and ending with the year 1928. A fixed amount was assessed against the various lots and then divided into ten installments which bore interest at six per cent. per annum; and it further appeared from the pleadings that many of the installments went delinquent and a determination of the issues called for the taking of testimony as to what payments were made, when they were made on the installments, and whether penalty and interest were collected, and much other data.

And it was further made to appear by a motion filed herein that virtually all evidence to be procured and offered [40] in the case was to come

from the books and records of the City of Wolf Point and county records located in the City of Wolf Point, and it was not feasible to remove these records to Great Falls, and that a Master should be appointed to take the testimony at the place where the records were located; and thereafter, on the 17th day of November, 1930, by an order duly given and made, and pursuant to the motion and, by agreement of counsel, for the parties, this Court appointed the undersigned as Special Master in Chancery, with authority to fix a time for taking testimony in Wolf Point, Montana, have the testimony reduced to writing, and with documentary evidence made up in a complete transcript, and make his report thereon and recommendations to this Court within a reasonable time thereafter. And thereafter he duly took the oath required by law, and, pursuant to stipulation of the parties, the case was set down for hearing in the State District Court Room, in Wolf Point, on Thursday, the 30th day of April, 1931, commencing at 10 A. M.

And, at the time appointed, Messrs. Marron & Foor appeared for complainant; Frank M. Catlin, Esq., and Messrs. Hurd, Hall & McCabe, for the defendant, City of Wolf Point; and Robert N. Erskine, Esq., of Chicago, Ill., for all other defendants. It was made to appear at the beginning of the hearing that the default of one defendant, A. W. Schreiber, had been entered, (Tr. 6), but notice

was given that a motion or petition would be filed to set aside the default and make him a party plaintiff in the suit, his interests being identical with those of the complainant.

All parties announced themselves ready to proceed and the Master appointed E. S. Koser (Tr. 3), of Plentywood, Montana, as Reporter, to take and transcribe the evidence and make a complete transcript. [41]

Evidence was introduced in behalf of all parties and the taking of testimony completed on the 8th day of May, 1931. The parties were then given time within which to submit briefs after completion of the transcript and various extensions were thereafter granted and the case finally submitted and now, within a reasonable time thereafter, the Master makes his report and recommendations to this Honorable Court.

All persons named as defendants, other than the City of Wolf Point, are bondholders and stand virtually in the same position as the complainant, except that they have taken a somewhat different position in their answer respecting the order in which the bonds are payable, but the issues involved were, as a matter of fact, between the defendant, City of Wolf Point, on one hand, and all other parties, on the other.

The Pleadings

The complainant, by way of amended complaint, alleged, among other things, the jurisdictional facts,

the passage and approval of a resolution confirming the issuance of bonds aggregating $37,966.53 to cover the cost of making special improvements, that is, laying sewers in the special improvement district created by the ordinance. It further alleges that the bonds were actually issued for the amount, being for $500.00 each, and numbered 1 to 75, inclusive; and an additional bond for $466.53, which was issued, being paid at once; that they were registered in three groups and were payable in numerical order; that bonds numbered 42 to 75 (thirty-four bonds in all), representing the principal sum of $17,000.00 are unpaid; that they matured January 1, 1929 and are past due; that bonds numbered 42 to 53 have been called but that on presentation the city refused to pay interest which had accrued, and that the bonds remain unpaid; that an assessment equal to the total principal sum of the bonds, [42] namely, $37,966.53, was made against the lots in the district to take care of the bonds, payable in ten installments with six per cent. interest from March 10, 1919, which was declared pledged to the payment of the obligation; that the first installment came due in November, 1919, and that this and subsequent installments were actually put in the collection and that the City Treasurer has each year received portions of the assessments, with interest, but that there have at all times been delinquencies, some of which have been collected, but a part of which remain unpaid; that there has come into the hands of the Treasurer

a sum of money, the exact amount of which is not known to the complainant and cannot be ascertained, but it believes the amount to be $43,069.93, which was dedicated to the payment of the bonds.

The complainant further alleges that the city officers, through the County Treasurer, are charged with the duty of collecting these assessments and administering the trust, and further complains:

(a) That certain specified sums have been diverted which have not been returned and which should have been applied on the bonds;

(b) Large sums have been collected and held for long periods without calling bonds for payment;

(c) That the city has neglected, in cases of default, to declare the full balance immediately due, and have allowed taxes and assessments to accumulate and tax deeds have been issued, and the security lost, and that the city has taken no action;

(d) That the assessment was not sufficient in the first place to meet the principal amount of the bonds and interest, but the city has nevertheless paid interest on the bonds as it accrued and called and paid certain bonds in full, and now [43] cannot pay a large number of the bonds owned by the complainant;

(e) That the city levied other assessments and overloaded these lots located in the district, and they could not be sold for the amount of the delinquencies and this was a breach of duty on the

part of the city, and the city should be required to compensate the complainant to the extent of the loss resulting to it;

(f) That the City Treasurer further had knowledge that on account of the delinquencies all bonds could not be paid and should therefore have apportioned moneys received instead of paying interest and the principal sum of the bonds in numerical order;

(g) That all of complainant's bonds, except perhaps No. 75, should have been paid, except for the neglect of the city.

(h) That the city should be required to act as trustee and further required to do all things necessary for the protection of the bondholders and that by reason of the delinquencies of the city, hereinbefore recited, it has become generally liable to the complainant.

All defendants except the City of Wolf Point and Schreiber admitted all allegations of the complaint, except as to the order in which the bonds were payable, and alleged that after a delinquency the fund should have been prorated and that interest and principal should have been kept separate, and further alleged that the lien was not lost through tax deed but continued.

The City of Wolf Point, by its answer, admitted the jurisdictional facts, passage of the resolution, assessment of the property, issuance of the bonds, and that they were called when funds were avail-

able and all had been paid except numbers [44] 42 to 75, inclusive, and that others were called but not paid. It also admitted that a tax was levied which was to be paid in ten installments, with interest at six per cent. per annum, and that the money was pledged to the payment of the bonds; admitted that the assessments were put into collection but that part of them were not paid.

The city further admits by its answer that it had received $48,873.15 for application towards the payment of the bonds and interest, and admitted that there remained on hand the sum of $6,273.34. It also admitted that the Treasurer is charged with the duty of collecting assessments and the distribution and payment of bonds and interest, and that such assessments have not been paid and part of the property had been sold for taxes and deed issued and the security forever lost; further admitted that the city paid in full interest first maturing and has paid bonds called for payment.

The city, however, denied and put in issue the following allegations of the complaint:

(1) Denied that the bonds were payable in numerical order and alleged that they were payable according to registration;

(2) Denied that the bonds bear interest at eight per cent. after maturity, and further denied a refusal to pay;

(3) Denied that the defendant was able to pay on account of delinquencies which amount to $7,890.08, with interest and penalties;

(4) Denied that funds were diverted and allege that all funds were repaid which were diverted.

(5) Admitted that the city received the sum of $48,873.15 for application to payment of the bonds and interest, and that it still had on hand the sum of $6,273.34; [45]

(6) Further denied that the city held money for long periods or allowed interest to accumulate, or that moneys had been paid out as interest which should not have accumulated if bonds had been called and retired promptly; further denied that moneys were misappropriated;

(7) Denied that the city failed to declare all assessments due promptly or allowed them to accumulate;

(8) The city denied that it failed to make proper provision for interest on the bonds, or that the assessments were inadequate for paying the bonds;

(9) The city denied that the fund was depleted through payment of interest or bonds called improperly, or that it in any way prevented the plaintiff from receiving payment of its bonds;

(10) Denied that the levies against the property exceeded its value so that the county was unable to sell it for the amount due; denied a breach of duty to continue to levy assessments, or that the City Treasurer in any way was delinquent in the discharge of his duties;

(11) The city further put in issue the ownership of the bonds, and denied that the city became trustee

with all the attributes of such a relationship, or that the fund should be distributed proportionately, or that an accounting should be made;

(12) Further denied that there was any misapplication of funds, or that the city became directly and generally liable for the unpaid bond issue.

The pleadings briefly raise the issue of the liability of the city in connection with a bond issue of a special improvement district within the city where the city has been guilty of alleged delinquencies above referred to and where it is apparent that due to much of the property within the district going to [46] tax deed the bond issue will not be paid in full out of the moneys belonging to the special improvement district.

The Evidence in the Case

When the case came on for hearing the complainant offered county records by years showing the total special improvement taxes against the various lots within the district, whether or not the various assessments were paid, and, if so, when, and whether penalty and/or interest had been collected by the County Treasurer (Tr. 22), and whether the property went to tax deed, and, if so, the date of issuance of the deed.

By stipulation of the parties, (Tr. 67), it was agreed that beginning with the year 1921 it would be necessary to offer evidence only as to the delinquent record, and that it would be assumed that if

it did not appear from the record that the installment became delinquent, it might be deemed to have been paid, with interest provided for by the resolution, to the same extent as if testimony concerning the same had been introduced.

This record did not segregate moneys collected by the County Treasurer belonging to District No. 12, involved in this case, but merely showed all special assessments due for the particular year, and a determination of the amount of the assessment, interest and penalty, if any collected, belonging to District No. 12, involved extensive tabulations.

The cash book of the city, offered in evidence, disclosed the total amount of moneys paid over to the city for special improvements according to the city records, (Tr. 149). This record, however, made no segregation of moneys belonging to Special Improvement District No. 12—merely showing the total moneys paid over to the City Treasurer by the County Treasurer for all special improvements.

Solicitors for the city offered evidence on cross-[47] examination to show instances where penalty and/or interest had not been collected in cases where installments had become delinquent, (Tr. 154).

Evidence was introduced to show the amount of delinquent taxes due in cases where deeds had been taken, the appraised value of the property, date of sale, amount for which sold, and the amount which had been paid, (Tr. 168); also that the deferred payments bear interest at six per cent. per annum.

And evidence also was introduced showing the total delinquencies against particular lots in cases where tax deeds had not issued, (Tr. 175).

And the complainant introduced the city's record showing receipts of money from the County Treasurer belonging to this district, the payments being allocated to the various lots within the district, (Tr. 186). This record, however, makes no mention of penalty and/or interest in cases where the installment was not paid in time and became delinquent before payment, and had evidently been collected by the County Treasurer, according to evidence introduced in the case. (See Tr. 22, et. seq.)

The testimony disclosed the amount of money paid by the County Treasurer to the City Treasurer as its proportionate part of the receipts from sales of lots in the district for which tax deeds had been taken. The evidence, however, did not show what part of this money belonged to District No. 12, but it is possible, by determining the total delinquencies on these lots and the total delinquencies on installments belonging to District No. 12, to determine what proportionate part of the moneys turned over to the City Treasurer belonged and should be allocated to District No. 12. [48]

FINDINGS OF FACT

The record includes considerable other testimony and documentary evidence offered in behalf of both parties and the aggregate thereof made up a very

compact and voluminous record. An analysis of this report called for exhaustive calculations and extensive tabulations, which could not in any feasible manner be made a part of this record, and it does not appear that they would serve any useful purpose. To set up in proper form, furthermore, for the purpse of making a part of this report, would entail considerable expense which it does not appear would be justified.

At the outset of the trial an issue was raised as to whether, inasmuch as the complainant was seeking an accounting, Equity Rule 63 was applicable, and the city was required to bring in its account in the form of debtor and creditor. The City of Wolf Point, which, for brevity, will hereafter be referred to as the defendant, contended that the complainant was not entitled to an accounting and that the accounting was merely incidental and the case involved many other questions, (Tr. 8).

The moneys derived from special assessments were by the city ordinance creating the district irrevocably pledged to the payment of the bonds, (pg. 1, Exhibit 1 attached to Amended Bill of Complaint). And, whether the city is to be regarded as a trustee or as an agent of the bondholders, the moneys coming into the hands of the defendant from such source, it appears, should be accounted for and should be used only for the purpose of retiring the bonds and paying the interest. And such money is, in a sense, at least, trust funds in the hands of the city. However, in view of the numerous

and intricate issues raised in the pleadings and the fact that the defendant denied that the complainant was entitled to an accounting and did account for so much money by admitting that it had received as moneys of the district the sum of $48,-873.15, and had on hand for application [49] to the payment of the bonds the sum of $6,273.34, (See answer, City of Wolf Point and Tr. 406), it appeared that notwithstanding the fact that much of the evidence to be introduced in the case was in the custody of the defendant, it was proper to require the complainant to take the initiative in the case and at least make out a prima facie case and establish by preponderance of the evidence the contraverted allegations of its complaint which do not involve the mere question of an accounting. (Tr. 8 et seq.)

One of the issues raised by the pleadings involves the manner in which the bonds should have been paid. The complainant alleges that they were payable in numerical order and callable when funds were available for retirement of one of them (Par. 6 Amended Complaint). The City of Wolf Point, on the other hand, asserts that they were payable in order of registration (See separate answer, City of Wolf Point); whereas, the other defendants take the position that as soon as an installment of the assessments became delinquent, then bonds should not have been called and paid in full, but this should have constituted notice to the City that there was going to be a shortage of moneys with

which to retire the bond issue, and that the moneys thereafter should have been prorated.

The Master finds from the evidence that the bonds were called and paid in numerical order; that while they were also retired in the order of registration, only part of those registered on a particular date were called and paid at that time; that of the unpaid, 42 to 54, inclusive, were registered November 20, 1918 and 55 to 75, inclusive, May 27, 1919, (See Certificates on Bonds); and under the pleadings it is admitted that bonds 42 to 53 were on certain dates called for payment (See Answer of City of Wolf Point), which did not represent the entire number registered on a particular date. The bonds called, it appears, were [50] not paid because interest was demanded, although the evidence discloses that there was no record of any proceeding directing the City Treasurer not to pay interest on bonds after maturity, (Tr. 185).

A contention of the complainant, contraverted by the defendant, is that the bonds bear interest at the rate of eight per cent. per annum after maturity. The bonds provide for six per cent. per annum "From date of registration of the bond until the date called for redemption." It appears that the bonds matured, if not previously redeemed, January 1, 1929, and since at that time had become due and payable, it seems that the rate of interest thereafter would be the legal rate payable on any obligation past due, but payable, of course, out of the fund belonging to District No. 12. Since the fund

will manifestly never be sufficient to discharge the principal sum of the bonds, the matter of interest does not seem important.

The evidence discloses that moneys belonging to the district were diverted and placed in other funds.

The Master finds that pursuant to an ordinance designated No. 100, funds were transferred, (Tr. 184), out of the fund belonging to this district. These transfers were in the amounts and occurred on the dates set opposite thereto, and were returned on the dates appearing after the respective amounts, as follows:

Amount	Date of Diversion	Date of Repayment
$ 511.67	Jan. 23, 1922	May 6, 1929
40.00	Jan. 4, 1922	"
522.55	Nov. 30, 1921	"
747.00	May 31, 1922	"
1,908.32	"	"

(Tr. 404, and see also Tr. 373, 379 and 392.) [51]

An examination of the bond records (Exhibit 48, separate from transcript), discloses payments made at intervals running over the entire period, commencing with January, 1920, following shortly after the collection of the first installment of taxes. From an analysis of the record of receipts of money by the City Treasurer and a comparison with the disbursement record, it does not appear that there was any large amount of money on hand at any

time which should have been applied to the payment of bonds, and the Master finds that, except for the diversions above referred to and which may hereafter be referred to, the charge that the city allowed large sums of money to accumulate without using to apply on bonds has not been sustained.

A conclusion as to the manner in which the diversions should have been handled is given in this report under Conclusions of Law.

The evidence shows that $1000.00 was paid out of the funds belonging to the district in having an audit made of the books of the city, this being regarded as the proper proportionate part of the expense of an audit which should be taken care of by the district. The Master finds that the district was never reimbursed on account of this disbursement. It does not appear that by use of adequate records an audit of the accounts pertaining to the district should have been necessary.

The pleadings indicate, and the Master finds, that the amount of the assessments coincided with the total bond issue; that each provided for interest at six per cent per annum, and, while the ordinance only provided for interest from final passage of the ordinance (See copy attached to amended bill), the set-up called for one year's interest on the first installment, or interest from November 30, 1918. Part of the bonds were not registered and did not bear interest except from May 27, 1919. (See bonds for date of registration). The total of assessments,

[52] (Schedule at back of amended bill), amounted to slightly more than the principal sum of the bonds, namely, to an aggregate of $38,011.20, and if installments had not become delinquent the amount realized from the assessments would have been ample to meet the bond issue. There was no evidence offered respecting the value of the various lots as to which deeds were issued.

The record reveals other special assessments against the property in the district, but the Master finds that the charge of excessive levies against the property has not been proven.

He further finds, however, that the property as to which tax deeds were issued, in numerous cases, was appraised at less than the aggregate of delinquent taxes and special assessments against the lots, and were sold for less than the total amount due, (Tr. 168).

The Master further finds that the following persons are the owners of the bonds numbered as appears after their respective names, aggregating the respective totals appearing after the bond numbers, to-wit:

Bond Number	Name	Amount	
42-44, Incl.	A. W. Schreiber	$1,500.00	(Tr. 7)
45-58, Incl. and 75	Hanchett Bond Company	7,500.00	(Tr. 6)
59-66, Incl.	Payne Avenue State Bank of St. Paul	4,000.00	(Tr. 408)
67 and 74	James Glassner	1,000.00	(Tr 409)
68-72, Incl.	Fulton County Bank of McConnelsburg	2,500.00	(Tr 409)
73	Dr. Louis D. Hyde	500.00	(Tr. 408)

With regard to the issues raised in the complaint and in the joint brief of the complainant and defendants, other than the City of Wolf Point, that the City Treasurer has been [53] derelict in the discharge of his duties and that other officials of the city and county have been guilty of delinquencies with respect to this bond issue, the Master finds that some of the assessments became delinquent in 1919 (See Tr. 22, et seq.), and that each succeeding year numerous assessments became delinquent and remained unpaid; that money belonging to the district was collected through the County Treasurer; that deeds to property were not taken on 1919 delinquencies or delinquencies for succeeding years until 1929; that the evidence does not disclose that upon an assessment becoming delinquent the Treasurer took any action with a view of declaring all subsequent assessments immediately due and payable, (Tr. 185); that subsequent to the passage of Chapter 96, Laws of 1923, the assessments were collected in two installments, although at the time the bonds were issued they were delinquent if not paid in November.

The records kept by the officials were inadequate and from the records introduced in evidence, it was impossible to determine readily what moneys were turned over to the city which should have been allocated to District No. 12.

The records of the city offered in evidence do not disclose the exact date when moneys were re-

ceived by the city, (Tr. 186). The city records offered do not show what moneys were turned over as penalty and interest, (Tr. 186), yet the total moneys receipted for by the city and the admissions indicate that such funds were accounted for by the county.

Regarding the contention of complainant that the proper city official did not certify the amount due in special assessments each year, a finding is made that the amount was certified by an official of the city, namely, the City Clerk.

The county failed to collect penalty and/or interest in some cases where the installments had become delinquent even though the penalty had not been remitted by legislative enactments, (e. g. Tr. 123.) [54]

The city records introduced did not show payments applicable to various lots received from the county after the issuance of tax deeds, (Tr. 186). The record bears out the charge that lots were subdivided subsequent to the imposition of the assessment, (e. g. Tr. 118, Lot 8, Block 6, et al.); that taxes were delinquent on a number of lots for more than thirty-six months prior to the institution of this action as to which tax deeds had not been applied for.

There is no evidence that the bondholders made any protest or initiated any action on account of the matters complained of until this suit was filed. They made no demand for a return of the moneys diverted to which reference has heretofore been made, (Tr. 395).

Three bonds were presented but not paid because interest thereon after maturity was demanded, (Tr. 399).

The city, at the close of the hearing, tendered the sum of $6,710.39 in Open Court, which, by stipulation, it was agreed, should be left in the hands of the city, (Tr. 405).

The city has admitted that it has received the sum of $48,873.15 for special assessment District No. 12, and an analysis of the testimony and documentary evidence offered conclusively establishes that due to numerous cases of delinquencies in the district and non-payment of assessments, the amount turned over to the city by the county, representing collections for the district, could not have exceeded this amount. The answer of the city was filed September 2, 1930.

The Master finds that the defendant issued seventy-six bonds against the district, one of which, for $466.33, was paid at once; that bonds numbered 1 to 41, inclusive, have since been paid; that it has paid out the total principal sum of $20,966.33, and the further sum of $16,874.58 as interest; that up to and including January 18, 1930 it had paid out the total [55] sum of $37,840.91 in discharge of bonds and payment of interest on the bond issue of District No. 12; and that no further or additional disbursements had been made, chargeable to District No. 12.

A finding is further made that by reason of the number of lots which had gone to tax deed, and the amount for which many of the lots have been resold, it does not appear that sufficient will be realized from its proportionate part of the purchase price, or from delinquencies in cases where deeds have not issued, to ever discharge the bond issue in full; that at the time of the hearing there remained a substantial sum due to the district on delinquent assessments in cases where tax deeds had not issued, part of which may have been or may hereafter be, collected; and there was also a large part of the purchase price of lots sold on contract after the issuance of tax deed unpaid, and the district will be entitled to its proportionate part of moneys collected on these contracts.

A further finding is made that $17,000.00, represented by thirty-four bonds, remains unpaid; that interest thereon has been paid to date of maturity of the bonds, to-wit, to January 1, 1929.

Conclusions of Law

The county was not a party to this suit, nor was any official of the city or county, and the issues are between the city and the bondholders. The bondholders, by charges, which they have for the most part sustained by proofs, raise issues which it appears naturally fall under three heads:

(1) Whether they are entitled to an accounting on the part of the city in this case;

(2) Whether, by reason of acts of omission and commission complained of, as to which findings have been made above, [56] it can be said that the city has been negligent and that the bondholders have, as a result, suffered damages, and the city should respond to the extent of the loss suffered; or,

(3) Whether, by reason of such acts, the fact that the bonds are payable out of a particular fund can be cast aside and moneys taken from the general coffers of the city, under process of this Court, with which to discharge the bond issue in full, on the theory that a general liability has resulted.

Improvement bonds do not ordinarily create a personal liability against the municipality and generally an action cannot be maintained on the bonds to recover a general judgment.

Steiner v. Capital Heights (Ala.) 105 So. 662.

But, if the funds are in the district to meet the obligations, the relation between the city and the bondholder is then virtually that of debtor and creditor, recourse, however, being limited to a particular fund.

If the administration of the fund has been regular and there is no money in it with which to liquidate the bondholder's claim, he has no recourse.

Other issues have been raised in this case, however, and, as solicitors for the bondholders have said, this is not so much a suit on the bonds as by reason of the bonds.

It is a proceeding in equity, instituted for the purpose of going behind the assessment fund itself.

The complainant and others have unpaid bonds; they are past due; they apply to the city and are advised that only a certain sum has come into the hands of the city which is insufficient to meet the amount due on the bonds outstanding. The original assessment was sufficient to take care of these obligations and when the bondholder holding an unpaid obligation presents his bond after maturity and finds the coffer empty or [57] insufficient money on hand to liquidate his and other claims, he has the right to come into equity and delve into the matter to find out what is wrong.

Whether regarded as a trustee or merely as an agent, of the bondholder, since the fund is irrevocably dedicated to the payment of the bonds by the ordinance which created the district, every dollar belonging to the fund is trust money to be used exclusively for retirement of the bonds and interest. It would be trust money whether the city is to be considered a trustee or merely an agent as moneys of the principal in the hands of the agent for a specific purpose is trust money and the relation of debtor and creditor does not exist as to it.

In view of this conclusion, it does not seem necessary to determine whether the city is a trustee or merely an agent.

2.

Counsel for the bondholders have cited numerous authorities in their brief to sustain the proposition

that the city is a trustee in such a case (Joint Brief of complainant and other bondholders), and with this we agree insofar as those cases hold that the money coming into the hands of the city belonging to the fund must be allocated to the payment of bonds, and dedicated to that purpose and used for no other.

The decisions cited by the complainant and the solicitors for the defendant appear to be in harmony with this rule but there appears to be a conflict of authority as to the extent of diligence the city is required to show in bringing about the payment of special improvement taxes. Some decisions cited by complainant hold that the city must be alert and exercise a high degree of care and diligence in attempting to bring about a collection of the assessments, and that it must be guilty of neither acts of omission or commission. On the other hand, [58] counsel for the defendant have cited numerous western decisions from which it is to be inferred that the city can assume a passive role and if installments are not being taken care of, it is for the bondholders to initiate some action for the purpose of safe-guarding their interests. None of the decisions hold the city to be a guarantor of collection or payment. This would be virtually tantamount to a general liability on the part of the city.

Securities of this kind are regarded as precarious and subject to certain hazards, not affecting securities which are payable out of a general fund.

On the one hand, however, numerous authorities state the rule to be that the city is liable as a trustee for failure to collect the assessments and require the city to do everything reasonably necessary and to exercise great diligence to accomplish that end.

> 6 McQuillan Municipal Corporations, Par. 2428.

But the Supreme Court of Montana, in Gagnon vs. City of Butte, 75 Mont. 279, said:

> "Primarily the City of Butte incurred no personal liability to the contractor who did the work. It was merely constituted an instrumentality of the law in initiating and carrying out the improvements and in collecting the money due upon assessments made by it against the property benefitted in order to pay the obligations incurred in execution of the work. * * * The plaintiff because of his interest in having the obligations paid, was required to know that which was being done or left undone in the premises by the city treasurer, and was afforded ample remedy under the law to compel the city treasurer to follow the mandates of the statute in the subjection of property embraced within the improvement district to the payment of the assessments levied. Consequent to the nature of the bonds and the law authorizing their issuance he had a special interest in seeing that the city treasurer made collection

> of all delinquent assessments within the improvement district or subjected the property benefited to sale where the owners thereof had failed to pay the tax, whereas the general taxpayers would, in most instances, be entirely oblivious of the failure of the city treasurer to perform his simple duty in this [59] respect and of possible consequences."

This Honorable Court, in Lumbermens' Trust Company v. The Town of Ryegate, cited by counsel for the defendant, expounded this same doctrine, and, while that case has been reversed on appeal, it does not appear that the reversal was the result of the Appellate Court's disapproval of the rule announced.

The lack of harmony in the decisions seems to be in connection with the acts of omission and commission of the city and its officers.

> See Note Goddard v. Inhabitants, etc., 30 A. S. R. 376.

Since this case involves a local question, it appears that the Laws of the State of Montana should be the rule of decision. The conclusion is therefore reached that the city, in the administration of this fund, is a mere conduit for receiving moneys belonging to the district and passing them on to the bondholders. It may be likened to a conduit because of the fact that no part of the funds should be intercepted, and it should deliver to the bondholders

all that it receives and because also its administration of the fund may be passive and not active.

It is furthermore the opinion of the Master that the preponderance of the evidence does not establish that the bondholders suffered any loss by reason of the acts of the city, assuming that it was the duty of the city to actively and with diligence endeavor to collect the assessments. What has been said, however, has no application to the right of the bondholders to collect interest on account of diversion of funds. The rule adhered to in this jurisdiction is based upon the theory that to require the general taxpayers to discharge the obligations would be to compel one who had received no benefit to pay an indebtedness which was not his. If the city diverted and used money belonging to the fund, however, the general taxpayer was benefited [60] thereby and the bondholder was damaged to the extent of interest at the rate provided for in the bond and the conclusion is therefore reached that the city should be required to respond to the extent of interest at six per cent. per annum from date of diversion of the various amounts until repayment.

3.

In view of what has been said, it is the opinion of the Master that the facts do not justify holding the city generally liable but that the judgment, however, should be in favor of the bondholders for the amount of moneys the city has received belong-

ing to the district, less the amount actually disbursed in retiring bonds and payment of interest accruing on the bonds; and for a further sum equivalent to interest on the various amounts diverted as aforesaid.

This claim is not barred by the statute of limitations or due to laches of the bondholder, as it appears interest was regularly paid and the bonds did not mature until the first of January, 1929. All bonds having matured prior to the time when certain of the unpaid bonds were called for payment and moneys not being available for payment of the entire issue at that time, the money, being trust money, should be prorated among the bondholders appearing in the case and whose appearance may hereafter be allowed.

Jewell v. City of Superior, 135 Fed. 19;
Rater v. City of Superior, 91 N. W. 651.

Solicitors for complainant and other bondholders strenuously assert in their brief that from the time of the first delinquency in the payment of assessments, which occurred in 1919, the city should have been put on notice that the issue was not going to be paid in full and the money should thereafter have been prorated. No complaint was lodged with the city officials, however, and from aught that appears in the record the method of re- [61] tirement of bonds in numerical order was entirely satisfactory to the holders until the city refused to pay interest after maturity on bonds called for payment.

RECOMMENDATIONS

The Master therefore hereby respectfully makes the following recommendations to this Honorable Court:

1. That this Court, by its judgment and decree find:

(a) That A. W. Schreiber is the owner of three bonds and there is due and owing to him on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of $1,500.00, together with interest thereon at 8% per annum from January 1, 1929;

(b) That the Hanchett Bond Company is the owner of fifteen bonds and there is due and owing to it on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of $7,500.00, together with interest thereon at 8% per annum from January 1, 1929;

(c) That the Payne Avenue State Bank of St. Paul, Minnesota, is the owner of eight bonds and there is due and owing to it on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of $4,000.00, together with interest thereon at 8% per annum from January 1, 1929;

(d) That James Glassner is the owner of two bonds and there is due and owing to him on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of $1,000.00, together with interest thereon at 8% per annum from January 1, 1929;

(e) That the Fulton County Bank of McConnelsburg, Pa., is the owner of five bonds and there is due and owing to it on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of $2,500.00, together with interest thereon at 8% per annum from January 1, 1929; [62]

(f) That Dr. Louis B. Hyde is the owner of one bond and there is due and owing to him on said bond, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of $500.00, together with interest thereon at 8% per annum from January 1, 1929;

2. That moneys received by the city since the filing of the answer or hereafter coming into the hands of the city, belonging to District No. 12, shall be prorated among the bondholders according to their several claims;

3. That the Court find that the city had on hand, at the time it filed its answer herein, as funds belonging to the district, the sum of $11,032.24, and that a judgment in favor of the bondholders, against the city, be granted accordingly, and the moneys derived therefrom be prorated;

4. That the Court further grant judgment in favor of the bondholders for interest at six per cent. per annum on:

$	511.67	from	January	23,	1922	to	May 6,	1929;
	40.00	"	"	4,	"	"	"	"
	522.55	"	November	30,	1921	"	"	"
	2,655.32	"	May	31,	1922	"	"	"

being a total of $1,355.83; to also be pro-rated;

5. That if it is at any time made to appear by petition of a judgment creditor, or creditors, herein, that any part of the judgment remains unpaid and moneys have been collected belonging to the district which should be applied to the payment of the judgment, an order to show cause may be issued herein on such petition;

6. That complainant and the bondholders have judgment for their costs herein; that the total costs in this action, Case No. 1583, and in Case No. 1887, a companion case heard at the same time, be divided, pursuant to stipulation of the parties, (Tr. Case 1887, p. 3), in the ratio of Five-sixths of the cost to be assessed in this case, and One-sixth charged to Case No. 1887; [63]

7. That the aggregate charges of the reporter were $528.30 and have been paid by the parties; the expenses and compensation of the Master have not been allowed or paid, and a separate application for allowance and an order directing payment thereof will be made.

Dated November 9, 1932.

Respectfully Submitted,
G. G. HARRIS
Special Master.

November 12, 1932,
Copies Mailed as Follows:
MESSRS. MARRON & FOOR,
Wolf Point, Montana;
FRANK M. CATLIN, ESQ.,
Wolf Point, Montana;
MESSRS. HALL & McCABE,
Strain Building,
Great Falls, Montana;
ROBERT N. ERSKINE, ESQ.
c/o Kraft & Erskine,
Harris Trust Building,
Chicago, Illinois.

[Endorsed]: Filed Nov. 12, 1932. [64]

Thereafter, on November 25, 1932, Exceptions of City of Wolf Point, Montana, to report and recommendations of Special Master, were duly filed herein, being in the words and figures following, towit: [65]

[Title of District Court and Cause.]

EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

Comes now the above named defendant, City of Wolf Point, and excepts to the report and recommendations of the Special Master filed herein on the 12th day of November, 1932, as follows:

1. Excepts to the finding of the Master appearing on page 12 of said report that the evidence discloses no record of any proceedings directing the city treasurer not to pay interest on bonds after maturity, for the reason that said finding is contrary to the evidence which discloses that the City Treasurer was directed by the Mayor of said City not to pay interest on bonds after the maturity thereof.

2. Excepts to the finding of said Master appearin on page 12 with relation to the payment of interest upon said bonds after maturity at the legal rate for the reason that said finding is contrary to law. [66]

3. Excepts to the finding of said Master appearing on page 12 with relation to the division of funds belonging to said district for the reason that said finding is not sustained by the evidence in said cause and is contrary to the evidence appearing therein.

4. Excepts to the finding of said Master appearing on page 13 with relation to the failure to re-

imburse said district in the amount of $100.00 for the reason that said finding is not sustained by the evidence in said cause and is contrary to the evidence therein.

5. Excepts to the finding appearing on page 14 with relation to the sale of property for delinquent taxes for the reason that said finding is incomplete in this, that it does not disclose that said property was sold by the County of Roosevelt for such delinquent taxes and not by the City of Wolf Point.

6. Excepts to the finding of the Master appearing on pages 14 and 15 with relation to the dereliction and negligence of the city treasurer and other city and county officials for the reason that said finding is not within the issues of said cause, neither the city treasurer nor any other city or county official having been made a party to this action, and for the further reason that said finding is incomplete in that it does not find that the property involved was sold and deeds taken thereto by the county treasurer of Roosevelt county.

7. Excepts to the finding of said Master appearing on page 16 with relation to the sum of money received by the City for Special Assessment District No. 12, for the reason that said finding is not sustained by the evidence and is contrary to the evidence adduced at said cause.

8. Excepts to the finding of said Master appearing on pages 16 and 17 with relation to the amount paid by said [67] city out of funds belonging to

said District No. 12, for the reason that said finding is not sustained by the evidence and is contrary to the evidence adduced at said hearing.

9. Excepts to the conclusion of said Master appearing on page 19 that the money collected by the city and belonging to said Special Improvement District is trust money and that the relation of debtor and creditor does not exist as to it for the reason that said conclusion is contrary to law.

10. Excepts to the conclusion of said Master appearing on pages 21 and 22 with relation to the payment of interest on funds alleged to have been diverted from said Special Improvement District, for the reason that said finding is in conflict with the finding of said Master "that the evidence does not establish that the bondholders suffered any loss by reason of the acts of the City" and for the further reason that said conclusion is contrary to law.

11. Excepts to the conclusion of the Master that the claim of said bondholders is not barred by laches in the statute of limitations for the reason that said conclusion is contrary to the evidence and the law.

12. Excepts to recommendation number 3 appearing on page 24 of said report upon the ground and for the reason that said recommendation is not sustained by the evidence adduced in said cause, and in fact is contrary to the evidence therein.

13. Excepts to recommendation number 4 appearing upon page 24 of said report for the reason that said recommendation is not sustained by the

evidence adduced in said cause and is contrary to such evidence and is contrary to law.

14. Excepts to recommendation number 6 appearing upon page 24 of said report for the reason that said recommendation is not sustained by the evidence adduced in said cause [68] and is contrary to said evidence, and for the reason that as appears from the evidence in said cause and the law applicable thereto the defendant City of Wolf Point should have judgment herein for its costs.

Dated this 22nd day of November, 1932.

FRANK M. CATLIN
HALL & McCABE
Attorneys for Defendant
City of Wolf Point.

[Endorsed]: Filed Nov. 25, 1932. [69]

Thereafter, on December 14, 1932, Order Allowing Fees of Special Master, and directing payment thereof, was duly filed and entered herein, being in the words and figures following, to-wit: [70]

[Title of District Court and Cause.]

ORDER ALLOWING FEES OF SPECIAL MASTER AND DIRECTING PAYMENT

A petition for allowance of fees having been filed herein by the Special Master in the case, and it appearing therefrom that the charges made and the expenses alleged to have been incurred by the Master are fair and reasonable,

It is ordered that the sum of $495.00 be, and the same is hereby, allowed as fees and expenses of G. G. Harris, Special Master in Chancery herein; and,

It is further ordered that the same be forthwith paid by the defendant City of Wolf Point, such disbursement to be assessed as part of the costs in this case, and if not paid within 15 days, the Master may have execution issued therefor.

Done this 14th day of December, A. D. 1932.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed and entered Dec. 14, 1932. [71]

Thereafter, on January 9, 1933, Exceptions to Report and Recommendations of Special Master were filed by the complainant herein, being in the words and figures following, towit: [72]

[Title of District Court and Cause.]

EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER.

The complainant together with the defendant bondholders except to the report of the Special Master in Chancery in this cause in the following particulars:

1. The finding (Report pp. 16) that one bond in the amount of $466.33 was issued and paid at once is not in accordance with the records of the City in evidence. Reference is made to the bond

register of the City in evidence as complainant's Exhibit 39. (Note:—Brief for counsel of the City in support of exceptions, at page 7, concedes that bonds were paid only in the amount of $20,500.00 instead of $20,966.33 as found by the Master.)

2. The conclusion (Report pp. 21) that the City in the administration of this fund is a mere conduit for receiving moneys belonging to the district and passing them on to the bondholders, and further that the administration of the fund by the City may be passive and not active, are not in accordance with the law whether as expressed in the statutes or by [73] the decisions of any courts. These conclusions are not in accordance with the findings of the Master's report which plainly indicate that the City did have some active duties to perform.

3. The Master should have found what duties were proper to be performed by the city pursuant to the statutes of Montana and the extent to which such duties had not been performed and what should be done in the future in the fulfillment of those duties.

4. The conclusions (Report pp. 21) that the evidence does not establish that the bondholders suffered any loss by reason of the acts of the City is contrary to the findings of the Master's report. The actual losses sustained are matters of computation which should have been made by the Master from the evidence before him.

5. The Master should have found as to all those cases where the full amount of an assessment with penalty and interest had not been collected either (a) that it was the duty of the City to now proceed to make collection of the balance; or (b) if it should appear that such balance was now uncollectible by reason of the failure of the City to collect in due course, that the city thereby became liable for the amount which should have been collected with the computation of such amount.

6. The conclusion (Report pp. 22) that the interest to be allowed upon diverted funds should be the rate provided for in the bonds is not in accordance with the law or the facts in this case. The Master should have found that the liability of the City is to make restitution to the District No. 12 fund of the amount diverted therefrom together with interest at the legal or statutory rate of eight per cent (8%).

7. The third recommendation (Report pp. 24) should show the balance on hand larger to the extent of $466.33, inasmuch as there was no payment of such bond as referred to in Exception No. 1 above.

8. The fourth recommendation of the Master (Report pp. 24) should have included an amount of interest computed at eight per cent (8%) instead [74] of six per cent (6%).

9. The Master should have recommended a judgment upon the bonds with the condition of payment

from the District No. 12 fund, as a basis for mandatory relief.

10. The Master should have recommended mandatory relief requiring the City to fully perform its duties.

ROBERT N. ERSKINE
CHARLES GORDON
Soli. for deft. bondholders.
ARLIE M. FOOR
Soli. for Complainant.

[Endorsed]: Filed Jan. 9, 1933. [75]

Thereafter, on January 10, 1933, Order substituting Carnegie National Bank as Plaintiff, was duly filed and entered herein, being in the words and figures following, towit: [76]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard upon the Petition of the Carnegie National Bank, a resident of the City of Carnegie, in the State of Pennsylvania, and it appearing and the court now finding that said Carnegie National Bank now holds all right, title and interest by assignment of the interest of the Hanchett Bond Company in and to these proceedings and in and to the bonds sued for of District #12 of the City of Wolf Point, and being now fully advised in the premises;

Therefore, it is ordered, that the Carnegie National Bank be and it is hereby substituted as Complainant in the above entitled cause in place and as the assignee of The Hanchett Bond Company, all proceedings in this cause to stand without prejudice as though said Carnegie National Bank had originally been a party hereto.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed and entered Jan. 10, 1933. [77]

Thereafter, on January 10, 1933, Order vacating default of A. W. Schreiber, etc., was duly filed and entered herein, being in the words and figures following, towit: [78]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard upon the Petition of Minnie Luebbe, a resident of the City of Carnegie and State of Pennsylvania, and the court having examined said Petition and being now fully advised,

Therefore, it is ordered, that the default heretofore entered in these proceedings against one A. W. Schreiber, as a defendant, be and the same is hereby set aside; that the said Minnie Luebbe be substituted in these proceedings in place of said A. W. Schreiber as the owner of bonds numbered 42, 43

and 44, issued for Improvement District #12, City of Wolf Point; and that the said Minnie Luebbe be and she is hereby permitted to join in these proceedings with the complainant, the amended Bill of Complaint herein and all proceedings in this cause to stand as though the said Minnie Luebbe were originally a party hereto.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed and entered Jan. 10, 1933. [79]

Thereafter, on January 10, 1933, Order granting leave to amend answer of Payne Avenue State Bank, et al, was duly filed and entered herein, being in the words and figures following, towit [80]

[Title of District Court and Cause.]

ORDER

This matter now coming before the court upon the motion of the defendants, Payne Avenue State Bank, James G. Gleassner, Fulton County Bank and Dr. Louis D. Hyde, to amend the Answer heretofore filed by them, and the Court having examined said Motion, considered the suggestions made in support thereof, and being now fully advised in the premises.

Therefore, it is ordered that leave be and is hereby granted to the above named defendants to amend their Answer heretofore filed in these pro-

ceedings and the said Answer shall be deemed to be amended on its face by substituting the words and numerals "Section 1 of Article XIV" in place of the words and numeral "Article V," wherein reference is made in said Answer to Article V of the Amendments to the Constitution of the United States.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed and entered Jan. 10, 1933. [81]

Thereafter, on January 10, 1933, Order directing payment to certain bondholders, was duly filed and entered herein, being in the words and figures following, towit: [82]

[Title of District Court and Cause.]

ORDER

This cause coming on to be heard upon motion of complainants and defendant bondholders, and upon the report filed herein by the Special Master in Chancery in this cause, and upon exceptions filed thereto with briefs and oral arguments presented by all parties;

And it appearing from said report that the City of Wolf Point has heretofore tendered as payment upon the bonds issued for District No. 12 the sum of $6710.39 which sum has been held by said City by consent of all parties subject to the order of the

court, and the Master has recommended the pro rata distribution of all sums upon all outstanding bonds found to be in the amount of $17,000.00.

And the holders of all bonds being before the Court in this cause, and now in open court having consented to such pro rata distribution, and the City of Wolf Point making no objections thereto; and all parties having consented to an immediate payment of a part of such moneys without prejudice to the rights of any of the parties hereto upon any other issue in this cause, subject only to the retention of a sufficient [83] amount to protect against any costs in these proceedings.

Therefore, it is ordered that this cause shall be taken under advisement by the Court upon the report of the Special Master and upon the exceptions now on file thereto, and upon the briefs and oral argument filed and presented, with leave to the defendant, City of Wolf Point to file a further reply brief if so advised.

And it is further ordered that the City of Wolf Point may and shall pay to the holders of such bonds of Improvement District No. 12 the total sum of $4590.00. Such payment to be made in pro rata proportion upon all bonds, being payment of 27 per cent of the face amount of such bonds to be endorsed upon each bond; and the Treasurer of the City of Wolf Point is hereby authorized to make such payment to the solicitors appearing herein for all bondholders, Arlie M. Foor and Robert Ers-

kine and to take the receipt of said solicitors for such payment; and the Clerk of Court is hereby authorized and directed to endorse such payment on all such bonds now on file herein as evidence in this cause.

Dated this 10th day of January, 1933.

CHARLES N. PRAY
Judge.

Approved
H. C. HALL
ROBERT N. ERSKINE
ARLIE M. FOOR.

[Endorsed]: Filed and entered Jan. 10, 1933. [84]

Thereafter, on May 2, 1933, Memorandum Decision on Special Master's Report, was filed herein, being in the words and figures as follows, towit: [85]

[Title of District Court and Cause.]

MEMORANDUM DECISION.

The court has given consideration to the two suits of the Hanchett Bond Company, a corporation, against the city of Wolf Point, and others, numbers 1583 and 1887, the reports of the Special Master, George G. Harris, in both cases, arguments and briefs of counsel, the pleadings and evidence

therein. That the special master is entitled to favorable mention is evidenced by the painstaking efforts disclosed by his reports.

The court should adopt the reports of the master unless it clearly appears that there are errors or mistakes that should be corrected. Certain questions have been raised to which the court will refer; aside from these both reports will be approved and adopted as the findings and conclusions of the court.

In respect to interest on the funds shown as having been diverted and set out on page 12 of the Master's report, and again referred to on pages 21 and 24, in case No. 1583, wherein he recommends judgment at 6% on the amounts given from the respective dates of diversion to those of repayment, counsel for the city claim that the record does not disclose any benefit to the city and that during the period of diversion the bondholders of district No. 12 received the full amount of interest at 6% as provided in the contract between the district and the bondholders; that they are entitled to no more interest and that there has never [86] been any default in that respect, citing R. C. M. 1921, Sec. 5249; that this section is a part of the contract, citing State ex rel Malott v. Conners, 89 Mont. 37. That "the general taxpayers of the city derived no benefit from money used to pay other special improvement bonds — apparently a mistake of the treasurer—or from mere book entries transferring on the city books from one fund to another without

actual use or expenditure." That the bondholders have already received 6% as provided by contract and that if this further payment is required they will be given 12% during the period of diversion shown in the master's report. The court does not agree with this contention. The restored fund, which had been diverted, with the interest thereon, should be applied in payment of the bonds, and the rate of interest should be controlled by the terms of the bond.

As to the question of interest payable after maturity, the Supreme Court of California held, in a case, hereinafter referred to, under facts similar to those present in this case, that interest can not be collected after maturity. The bond in this case provides: "This bond bears interest at the rate of (6) six per cent per annum from the date of registration of this bond as expressed herein until the date called for redemption. The interest on this bond is payable annually on the first day of January in each year, unless paid previous thereto, and as expressed by the interest coupons hereto attached, which bear the facsimile signatures of the Mayor and Clerk. This bond is payable from the collection of a special tax or assessment, which is a lien against the real estate within said improvement district, as described in said resolution hereinbefore referred to. This bond is redeemable at the option of the city at any time there are funds to the credit of said Special Improvement District No. 12 Fund,

for the redemption thereof, and in the manner provided for the redemption of the same, and is due and payable not later than January 1, 1929." That is to say, the bond bears interest at 6% from date of registration until the date called for redemption. This language would seem [87] to indicate that the bonds are to bear interest at 6% until the date called for redemption, whether before or after maturity; it appears that the unpaid bonds in question are still drawing interest at 6% according to contract, since they have never been called for redemption and paid. It is true that some of the bonds in these suits were called for redemption some time after maturity, but it does not appear to have been a bona fide call, for the bonds were not redeemed. Such a notification to the bondholders amounted to nothing at all, and certainly was not the call for redemption intended by the language of the bond. It most assuredly was not intended that the obligor could call the bonds, refuse payment and thereby stop the running of interest. The case cited by counsel for the city, towit: Meyer v. City and County of San Francisco, 88 Pac. 722, relates to a bond containing a different wording; there the levy made for the payment of interest was to be applied only to the payment of the interest coupons, clearly indicating that no tax was to be levied except for interest represented by the interest coupons attached to the bond, and therefore could not be levied for interest after maturity; here

the intent seems to be to pay interest until the bonds are paid, or called for redemption, as expressed therein. But, of course, the interest would have to come from the particular fund mentioned, and would be according to the rate fixed by contract.

From the master's reports, the arguments of counsel and the evidence, the court does not feel justified in adopting the totals of receipt and disbursements urged by counsel for the city. Except as herein modified the reports of the Special Master are hereby approved as submitted to the court.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed May 2, 1933. [88]

Thereafter, on January 10, 1939, an Order to Show Cause why cause should not be dismissed, was duly filed and entered herein, being in the words and figures following, towit: [89]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

It is ordered and this does order that the parties plaintiff and defendant herein be and appear before the court at the courtroom thereof in the Federal Building at Havre, Montana at the hour of ten o'clock in the morning on January 21, 1939, to

show cause, if any they have, why this action should not be dismissed.

Done in open court at Helena, Montana, January 10, 1939.

JAMES H. BALDWIN
United States District Judge,
District of Montana.

[Endorsed]: Filed and entered Jan. 10, 1939. [90]

Thereafter, on January 21, 1939,

ANSWER TO ORDER TO SHOW CAUSE

was duly filed herein, being in the words and figures following, towit: [91]

[Title of District Court and Cause.]

Now comes Robert N. Erskine and shows to the court that he is the attorney for certain of the defendants in the above causes, being holders of bonds of the City of Wolfe Point, and for and in behalf of whom he now acts; that he has been advised by telegram from the Honorable Arlie M. Foor as attorney for plaintiff in the above causes that an order has been entered to show cause why said causes should not be dismissed. Defendant bondholders object to any dismissal of said proceedings and ask for the entry of a final decree therein and now submit to the court the following reasons:

It is represented to the court that upon the filing of the Master's Report in said causes exceptions

were filed thereto by the defendant City of Wolf Point. Thereafter arguments were heard in open court upon such exceptions and briefs were filed by all parties, and said causes were taken under advisement by the court. In due course a decision was announced by the court substantially sustaining and approving all of the findings of the Master's Report with perhaps minor exceptions.

Within a few days after the decision of the court was announced the [92] undersigned in behalf of all bondholder parties prepared a draft of Findings of Fact and Conclusions of Law whereby the court would adopt as its own the findings and conclusions contained in the Master's Report. Such instrument was thereupon submitted to the attorneys for the City of Wolf Point with a letter commenting upon Sections 70½ and 71 of the Equity Rules of the United States Court with the suggestion that it would simplify the record of said causes if the parties would stipulate that the court might so adopt the findings and conclusions of the Master's Report as constituting the findings and conclusions of the court thereby avoiding the preparation and filing of lengthy findings of fact and conclusions of law substantially the same as contained in the Master's Report. In the answer to such suggestion the attorneys for said city declared that they preferred specific findings and conclusions.

Thereafter there was prepared at considerable length and there was submitted to the attorneys for the City of Wolf Point as to each of the above

cases (1) Findings of Fact and Conclusions of Law; and (2) a Decree. Copies of the foregoing were also submitted to Mr. Arlie M. Foor as attorney for complainants with original copies which he was requested to present to the court. The undersigned is advised that the attorneys for the city thereupon immediately made the request to Mr. Foor that the presentation of such documents to the court should be delayed until the attorneys for the city had sufficient time for a careful examination thereof. Thereafter it was suggested that there were objections to the documents so submitted, that a personal conference for the settlement of such objections seemed advisable, and that such conference might be delayed until such time as the undersigned, who was a resident and practicing attorney of Chicago, Illinois, might make a trip to Montana in connection with certain other litigation also pending in this court.

The undersigned further says that despite the great lapse of time the attorneys for the city have never indicated their objections either to the said Findings of Fact and said Conclusions of Law or to the said Decrees as to either of the above cases and they have not at any time requested the presentation thereof to the court. Neither have the attorneys for the city prepared and submitted any alternate form of decree. These causes have been heard by the court and de- [93] cisions of the court have been announced, and no further action is necessary

therein except the actual filing of decrees together with findings of fact and conclusions of law in accordance with the rules of this court.

Wherefore, in behalf of bondholder parties to said proceedings it is urged that said cases should not be dismissed, but that the court shall act upon and duly file and enter of record in proper form, pursuant to the rules of this court, (1) Findings of Fact and Conclusions of Law, and (2) Decrees.

ROBERT N. ERSKINE
Attorney for Defendant
Bondholders.

State of Illinois
County of Cook—ss.

Robert N. Erskine, being first duly sworn, deposes and says that he has read the above and foregoing answer subscribed by him and that the same is true and correct.

ROBERT N. ERSKINE

Subscribed and sworn to before me this 18th day of January, A.D. 1939.

[Seal] EVELYN HOLSTE
Notary Public.

[Endorsed]: Filed Jan. 21, 1939. [94]

Thereafter, on January 21, 1939, the Order to Show Cause, answer thereto, and objections to dismissal, were duly submitted to the court, the record

of the hearing thereof being in the words and figures following, towit: [95]

In the District Court of the United States in and for the District of Montana. At Havre.

At a stated term, to wit, the January Term, A. D., 1939 of The District Court of the United States and *and* for the District of Montana, begun and held at the court room of said court in the Federal Building at the City of Havre, Montana, on Saturday at 10 A. M. on January 21, 1939, pursuant to statute and the order of the said Court.

Present: Honorable James H. Baldwin, United States District Judge, for the District of Montana.

Thereupon the following proceedings were had and done:

No. 1583, The Hanchett Bond Co. vs. City of Wolf Point, et al.

This cause was duly called for hearing this day on the order to show cause why the case should not be dismissed for want of prosecution. Thereupon Mr. Foor, of the firm of Marron & Foor, counsel for the plaintiff, filed and presented an answer to the order to show cause and objections to the dismissal of the case, and the matter was submitted to the court and taken under advisement. Mr. Foor was granted leave to submit proposed findings of fact and conclusions in connection with

the request therefor contained in said answer to order to show cause.

C. R. GARLOW,
Clerk. [96]

Thereafter, on February 10, 1939, Proposed Findings of Fact and Conclusions of Law were lodged with the Clerk of this Court, and are in the words and figures following, towit: [97]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause now coming on to be heard before the Court upon the report and recommendations of the Special Master in Chancery heretofore appointed by this Court, together with the transcript of evidence submitted therewith, and the Court having examined the pleadings herein and all amendments thereto, and such report with recommendations and the transcript of evidence, and having examined briefs filed herein and heard the arguments of counsel and being fully advised.

Now, therefore, the Court makes and declares its findings of fact upon the record herein, as follows:

1. That the Carnegie National Bank, a corporation of the City of Carnegie, Pennsylvania, has succeeded to the rights of The Hanchett Bond Company as complainant herein, and is now the owner of bonds numbered 45 to 58 inclusive, and

also bond #75, issued by the City of Wolf Point, defendant herein, for Improvement District No. 12 of said City, and that there is now due and owing to said Carnegie National Bank, the face value of said bonds in the amount of $7,500.00, together with interest thereon at 6% per annum from [98] January 1, 1929.

2. That Minnie Luebbe, as complainant herein, and as successor to A. W. Schreiber, originally named as defendant herein, is now the owner of bonds numbered 42, 43, and 44 issued by the defendant City of Wolf Point for Improvement District No. 12, and that there is now due and owing to said Minnie Luebbe, the face value of said bonds in the amount of $1,500.00, together with interest thereon at 6% per annum from January 1, 1929.

3. That Payne Avenue State Bank, of the City of St. Paul, Minnesota a defendant herein, is the owner of bonds numbered 59 to 66 inclusive, and that there is now due and owing to said Payne Avenue State Bank, the face value of said bonds in the amount of $4,000.00, together with interest thereon at 6% per annum from January 1, 1929.

4. That James G. Gleassner, of York, Pennsylvania, a defendant herein, is the owner of bonds numbered 67 and 74, and that there is now due and owing to said James G. Gleassner, the face value of said bonds in the amount of $1,000.00, together with interest thereon at 6% per annum from January 1, 1929.

5. That the Fulton County Bank of McConnelsburg, Pennsylvania, a defendant herein, is the owner of bonds numbered 68 to 72 inclusive, and that there is now due and owing to said Fulton County Bank, the face value of said bonds in the amount of $2,500.00, together with interest thereon at 6% per annum from January 1, 1929.

6. That Dr. Louis D. Hyde, of Owedo, New York, a defendant herein, is the owner of bond #73, and that there is now due and owing to said Dr. Louis D. Hyde, the face value of said bond in the amount of $500.00, together with interest thereon at 6% per annum from January 1, 1929.

7. That the moneys derived from special assessments levied upon the property of Improvement District No. 12 were, by the city ordinance creating the district, irrevocably pledged to the payment of the bonds of said district and the said bonds were payable only from the proceeds of said special assessments.

8. That the bonds numbered 42 to 75 inclusive, owned as aforesaid, and of the aggregate face value of $17,000.00, constitute all of the bonds of [99] Improvement District No. 12 of said City now outstanding.

9. That the City of Wolf Point, a municipal corporation of the State of Montana, by proceedings under the law of Montana, organized Improvement District No. 12 for the purpose of construction of

a sewer and to defray the cost of such construction work levied a special assessment against the property within said district constituting about four hundred lots, which assessments were made payable in ten annual installments in the years 1919 to 1928 inclusive, with interest payable annually at 6%; that said assessments were levied in the gross amount of $38,011.20, and the said City of Wolf Point issued seventy-five (75) bonds of the denomination of $500.00 each, numbered 1 to 75 inclusive, and one bond for $466.53 numbered 76, which bonds were issued to anticipate the collection of the said special assessments and were payable from the proceeds thereof and by the terms thereof and under the Statutes of Montana were redeemable at the option of the City at any time when there were funds available from the proceeds of the collection of said special assessments, and interest was made payable on said bonds at 6% per annum until the time when any such bonds should be redeemed; that the City of Wolf Point has, prior to the filing of this suit, redeemed bonds numbered 1 to 41 inclusive and 76 in the aggregate amount of $20,966.33, and said City has also paid interest on all bonds from time to time remaining outstanding and until January 1, 1929, and that the total amount of interest so paid amounted to $16,874.58.

10. That under the statutes of the State of Montana, such bonds are payable only when called for redemption after moneys are available for that pur-

pose, and they can have no fixed date of maturity, and, therefore, the bonds here in question continue to draw interest at 6% per annum without regard to the fixed date of maturity named in said bonds to-wit, January 1, 1929, but any and all such interest is payable only from the proceeds of collection of the said special assessments.

11. That the City of Wolf Point has established and maintained in accordance with the requirements of the laws of the State of Montana, a fund known as Special Improvement District No. 12 Fund to which there have been credited certain proceeds of collection of the said special assessments and [100] against which there have been debited the bonds and coupons which have been paid.

12. That the City of Wolf Point has collected and received from the proceeds of the collection of the said special assessments on account of principal and interest thereof, and up to the second day of September, 1930, the total gross sum of $48,873.15, but that the whole of said amount has not been credited to the said Special Improvement District No. 12 Fund; that the total amount proper to be paid and which has been paid out of said Special Improvement District No. 12 Fund is the sum of $37,840.91, which amount was paid on account of bonds and interest as aforesaid; and there remained a balance from the collection of said special assessments to be accounted for by the City of Wolf Point, as such Special Improvement Dis-

trict No. 12 Fund, in the amount of $11,032.24, as of the 2nd day of September, 1930, but the actual amount credited upon the books of said City to said Special Improvement District No. 12 Fund as of said date was much less than said amount, namely, $6,273.34.

13. That on said date, September 2, 1930, there remained payable to the City of Wolf Point a substantial sum on account of such special assessments not yet collected in cases where tax deeds had not issued, part of which may have been or may hereafter be collected, and also a large part of the purchase price of certain lots sold by the County Treasurer on contract after the issuance of tax deed for such delinquent assessments; and that all such amounts remaining due and unpaid on account of such special assessments for Improvement District No. 12 constitute a credit of said Special Improvement District No. 12 Fund as and when collected.

14. That the said City of Wolf Point diverted from the said Special Improvement District No. 12 Fund, and credited to other funds of said City, the amounts and on the dates as follows:

The sum of $511.67 on January 23, 1922,
The sum of 40.00 on January 4, 1922,
The sum of 522.55 on Nov. 30, 1931,
The amounts of $747.00 and $1,908.32 on May 31, 1922,

making the aggregate amount of such diversions $3,729.54, which sum was returned to and credited

on the books of said City to the Special Improvement [101] District No. 12 Fund on May 6, 1929; that interest at the rate of 6% per annum on said amounts, from the dates of the respective diversions to May 6, 1929, amounts to $1,355.83.

15. That the City of Wolf Point has not accumulated and held any large amount of money at any time which should have been applied to the payment of bonds, except for the amount of the diversions indicated in the preceding paragraph.

16. That the City of Wolf Point used and paid out of the Special Improvement District No. 12 Fund, the sum of $100.00 on account of an audit made of the books of the City and for which said District No. 12 Fund was never reimbursed, and said audit as to District No. 12 Fund would not have been necessary by the use of adequate records; but the records kept by the officials relating to the collection and disbursements of said assessments were inadequate and it was impossible from such records to determine readily what moneys were turned over to the City of Wolf Point which should have been allocated to the Special Improvement District No. 12 Fund.

17. That the amount of the assessments levied for and against Special Improvement District No. 12 were sufficient if collected in full to pay in full the bonds issued and interest thereon.

18. That the property as to which tax deeds were issued, in numerous cases, appraised at less

than the aggregate of delinquent taxes and special assessments against the lots, and were sold for less than the total amount due.

19. That some assessments levied for the improvement above described became delinquent in 1919 and that each succeeding year numerous assessments became delinquent and remained unpaid, but that tax deeds on such property were not taken on the delinquencies of the year 1919 or delinquencies for succeeding years until the year 1929.

20. That the City Treasurer, when an assessment became delinquent, took no action to declare all subsequent assessments immediately due and payable.

21. That subsequent to the passage of Chapter 96 of the Laws of 1923 of the State of Montana, the assessments were collected in two installments [102] although at the time the bonds were issued the assessments became delinquent if not paid in November.

22. That the City of Wolf Point and its collecting agents permitted lots to be subdivided subsequent to the imposition of the assessment and permitted and accepted the payment of partial assessments applicable to a part of the subdivided lots leaving the assessment as to the remainder of such lots delinquent and unpaid.

23. That the City of Wolf Point through the county officials failed to collect penalty and/or interest in some cases where the Installments had

become delinquent even though penalty had not been removed by legislative enactments, and the Special Improvement District No. 12 Fund has not been credited with the amount of such penalty and/or interest.

24. That assesssments were delinquent on a number of lots for more than thirty-six months prior to the institution of pending proceedings as to which lots the City of Wolf Point and its collecting agents has not applied for any tax deeds.

25. That by reason of the number of lots that had gone to tax deed, and the amount for which many of the lots have been resold, it does not appear that sufficient will be realized to the credit of the Special Improvement District No. 12 Fund from the proportionate part of the purchase price of the lots sold or from delinquencies in cases where deeds have not issued, to ever discharge the bond issue in full.

26. That at the time of the hearing in this cause there remained a substantial sum due to said Special Improvement District No. 12 from and on account of delinquent assessments in cases where tax deeds had not issued, part of which may have been or may hereafter be collected, and from and on account of a balance due on the purchase price of lots sold on contract after the issuance of tax deed, a proportionate amount of which balance will be payable to said District No. 12 Fund.

27. That the holders of bonds made no demand on the City of Wolf Point for a return of the moneys hereinbefore found to have been diverted and made no protest and initiated no action on account of any of the matters and [103] things relating to the collection and enforcement of assessments hereinbefore found to be true, until the filing of this suit.

28. That the City of Wolf Point issued seventy-six bonds payable from said Special Improvement District No. 12 Fund, of which bonds numbered 1 to 41 inclusive for $500.00 each, and bond #76 for $466.33, have been paid in full, making a total payment on account of the principal of such bonds, $20,966.33, and there are now outstanding and unpaid thirty-four bonds of $500.00 each, numbered 42 to 75 inclusive in the aggregate amount of $17,000.00; that interest was paid on all bonds outstanding up to January 1, 1929, but that no interest was paid on any bonds accrued subsequent to said date; that the total amount paid by the City of Wolf Point on account of interest on all such bonds was the sum of $16.874.58, making the total aggregate payment on account of both bonds and the interest thereon the total sum of $37,840.91, and that no further or additional disbursements have been made by the City of Wolf Point chargeable to said Special Improvement District No. 12 Fund.

29. That the City of Wolf Point by its Answer

filed in this cause admitted liability for and tendered to the account of bondholders the sum of $6,273.34 as constituting the full amount then held to the credit of said Special Improvement District No. 12 Fund, and thereafter at the close of the hearing in this cause said City of Wolf Point tendered in open court the sum of $6,710.39; and thereafter pursuant to the Order of this Court entered by agreement of all parties said City of Wolf Point paid to the several bondholders, parties to this suit, in pro rata proportion upon all bonds a payment of 27% of the face amount of such bonds, being the total sum of $4,590.00, which sum should be credited against the amount herein found to be the balance to be accounted for by the City of Wolf Point as such Special Improvement District No. 12 Fund in the amount of $11,032.24 as of the second day of September, 1930.

30. That the moneys derived from the special assessments here in question were by the City Ordinance creating said District No. 12 irrevocably pledged to the payment of the bonds issued on account thereof and all such moneys should be accounted for and should be used only for the purpose of retiring the bonds issued for such improvement with the interest thereon. [104]

31. That the City of Wolf Point collected and paid bonds in numerical order prior to the date of maturity shown on said bonds and prior to the date of collection of the last installment of said assess-

ment, but that no objection was made by any bondholder at any time to such payment.

32. That after said date of maturity of said bonds and of the final installment of said assessment all funds then remaining in said Special Improvement District No. 12 Fund should be distributed and paid in equal pro rata proportion upon all bonds then remaining outstanding and unpaid.

33. That bondholders have suffered no loss by reason of the acts or ommissions of the City in failing to actively and with diligence endeavor to collect the assessments levied for and against Special Improvement District No. 12.

34. That the Master by his report has made full and sufficient findings upon all questions of fact; that the findings of fact contained in said report are complete and in accordance with the evidence; and that such findings of fact should be and are hereby approved and confirmed.

35. That complainant and other bondholders are entitled to their costs heretofore advanced and paid in this cause; that it appearing that the defendant city has heretofore paid to the Special Master in Chancery the full amount of his expenses and compensation as approved and allowed by the Court herein, therefore no further allowance is now made in favor of complainant and against the defendant city on account thereof; that it further appearing that said bondholders and the defendant city have heretofore paid in equal proportions between them

the aggregate charges of the court reporter in the total amount of $528.30 under an agreement that five-sixths thereof be apportioned and assessed in this case, and one-sixth in case No. 1887 pending in this Court and tried upon a joint record herewith, therefore it is found that there be now assessed to and paid by the defendant city as a part of the costs in this cause the sum of $220.13 for such charges of the court reporter which amount shall be credited to the Special Improvement District No. 12 Fund under the terms hereof. [105]

CONCLUSIONS OF LAW

And the Court now hereby makes and declares its conclusions of law upon the issues in this cause under the pleadings herein and upon the findings of fact hereinabove set forth, as follows:

(1) That the principal issues of law under the pleadings and facts of this cause are:

(a) Whether bondholders are entitled to an accounting on the part of the City in this case;

(b) Whether, by reason of acts of omission and commission complained of, as to which findings have been made above, it can be said that the City has been negligent and that the bondholders have, as a result, suffered damages, and the City should respond to the extent of the loss suffered; or

(c) Whether, by reason of such acts, the fact that the bonds are payable out of a particular fund can be cast aside and moneys taken

from the general coffers of the city, under process of this Court, with which to discharge the bond issue in full, on the theory that a general liability has resulted.

(2) That equity rule 63 was not applicable in this cause as requiring the defendant city in the first instance to bring in its account in the form of debtor and creditor but the burden was on complainants to take the initiative in this case and to make out a prima facie case, establishing by a preponderance of the evidence the contraverted allegations of the Bill of Complaint.

(3) That the City of Wolf Point has no direct general liability upon the improvement bonds sued upon herein such that a general judgment can be had on the bonds as such, but the improvement bonds of the City of Wolf Point are payable solely from the proceeds of special assessments levied for the purpose.

(4) That the proceeds of collection of the special assessments [106] against which the improvement bonds in question are issued constitute a fund irrevocably dedicated to the payment of said bonds and interest thereon.

(5) That whatever moneys are collected from the special assessments in question constitute trust funds to be used exclusively for the retirement of bonds and interest.

(6) That it is not material or necessary, under the issues and evidence in this cause, to determine

whether the city is a trustee or merely an agent for bondholders, because in either event the special assessment moneys collected for the specific purpose of paying principal and interest of bonds constitute trust funds in the possession of the City and as to such moneys the relationship of debtor and creditor only as between city and bondholder does not exist.

(7) That the relation of debtor and creditor as between City and bondholder may apply to the extent only that recourse is limited to the particular fund actually collected; and if the administration of that fund has been regular, but there is no money in the fund with which to liquidate the bondholder's claim, then the bondholder has no other recourse.

(8) That the suit before the Court constitutes a proceeding in equity by reason of the bonds for the purpose of investigating the administration of the assessment fund rather than a suit on the bonds themselves.

(9) That bondholders have a right to an accounting in equity when the bonds remain unpaid after maturity and the City claims an insufficient amount of money on hand to pay the bonds.

(10) That the City of Wolf Point in the administration of the Special Improvement District No. 12 Fund is a mere conduit for receiving moneys belonging to such fund and passing them on to bondholders; that no part of the funds should be intercepted and all of the moneys received should

be delivered to bondholders, but otherwise and in the collection and administration of the fund the duties of the City are passive and not active; that this case involves a local question and the laws of the State of Montana constitute the rule of decision upon such local question as stated by the Supreme Court of Montana in the case of Gagnon v. The City of Butte, 75 Mont. page 279. [107]

(11) That where the City has diverted and used money belonging to the Special Improvement District No. 12 Fund, thereby benefitting general tax buyers through the use of such money and damaging bondholders to the extent of interest at the rate provided for in the bond, the City of Wolf Point should be required to pay interest upon the funds diverted at the rate of 6% per annum from the date of the diversion until the repayment thereof to the Special Improvement District No. 12 Fund, and said City is liable for the amount of such interest.

(12) That the City of Wolf Point is liable for the amount of moneys that the City has collected and received belonging to and collected for Special Improvement District No. 12, less the amount actually dispersed in payment of bonds and the interest accrued on the bonds.

(13) That after the maturity of bonds when funds are not available for payment of bonds in full then all moneys as trust funds should be prorated upon and among all outstanding bonds.

(14) That when the bonds did not mature until

the first day of January, 1929 and interest was paid to that date, there was no laches on the part of bondholders in the bringing of this suit and the claim of bondholders is not barred by any statutes of limitations.

(15) That the City of Wolf Point was not put on notice and had no obligation to prorate the moneys collected upon all outstanding bonds by reason of the delinquency in the payment of assessments beginning in the year 1919, when bondholders made no complaint to the city as to the method of paying bonds in numerical order, but acquiesced therein.

(16) That interest on the bonds here in question is payable at the rate named in the bonds, to-wit, 6% per annum, until the bonds shall be properly called for redemption without regard to any expressed date of maturity, but such interest is payable only from the proceeds of the special assessments belonging to the Special Improvement District No. 12 Fund.

(17) That all moneys collected and received on account of the special assessments levied for Special Improvement District No. 12 Fund subsequent to the accounting herein, belong to the Special Improvement District No. [108] 12 Fund and are applicable to and should be prorated upon all outstanding bonds.

(18) That the City of Wolf Point had no duties to perform and has no obligation to bondholders,

because of its acts or failures to act in the following particulars: (a) That property was sold for less than the amount of accumulated taxes and special assessments after tax deeds had been taken thereon; (b) that properties remained delinquent in the payment of assessments from the year 1919 and until the year 1929 without tax deed being taken thereon; (c) that the City Treasurer took no action to declare assessments due and payable after delinquency; (d) that assessments for the years 1924 and thereafter were collected in two installments; (e) that property was subdivided and payment of partial assessments permitted; (f) that penalties and interest were not collected in full when due; (g) that properties still remain delinquent with no tax deeds taken thereon; (h) that by reason of the failure to collect in full, the total of all present delinquent assessments is not sufficient, if collected in full, to pay the outstanding bonds and interest.

(19) That the conclusions of law upon the issues before the Court under the pleadings herein as made by the Master in his report are correct and are now hereby expressly approved and confirmed except only that conclusion which holds that the bondholders are entitled to interest upon their bonds after the expressed date of maturity thereof at the legal rate of 8% per annum, it being now expressly held that interest is payable upon said bonds only at the rate specified therein.

Therefore, it is ordered that the foregoing are

now hereby adopted, filed and entered of record by this Court as its findings of fact and conclusions of law thereon in this cause.

Enter:

.....

Judge.

[Endorsed]: Lodged in Clerk's office Feb. 10, 1939. [109]

Thereafter, proposed Decree was lodged with the Clerk of this court, being in the words and figures following, to wit: [110]

[Title of District Court and Cause.]

DECREE

This cause came on to be heard at this term upon the findings of fact and conclusions of law made and filed by the Court herein, and was argued by counsel; and thereupon, upon consideration thereof,

It is ordered, adjudged and decreed:

(1) That the City of Wolf Point, Montana, shall maintain a trust fund to be known as Special Improvement District No. 12 Fund, and shall credit to and pay into the said fund the entire proceeds of the collection of a certain special assessment levied against the property lying within and known as Improvement District No. 12 of the said City, and shall proceed hereafter according to law to collect the said special assessment, and shall imme-

diately restore to the said fund the sums hereinafter specifically set out.

(2) That the City of Wolf Point, Montana, pursuant to the accounting herein and the findings of fact made by the Court, shall forthwith account for, make restitution to and pay into said Special Improvement District No. 12 Fund the sum of $4,758.90, which amount shall be in addition to the sum of $6,273.34 previously credited upon the books of said City so that said Fund [111] shall be in the amount of $11,032.24 as of September 2, 1930, subject only to a credit for the sum of $4,590.00 heretofore distributed and paid under order of this Court, and judgment is so entered; and the said amount necessary to make such restitution and payment shall be paid out of general taxes to be levied for the purpose or out of any other funds that may be available.

(3) That the City of Wolf Point, Montana, shall forthwith pay into said Special Improvement District No. 12 Fund the further sum of $1,355.83, and judgment is so entered, representing interest upon moneys diverted, pursuant to the accounting herein and the findings of fact made by the Court; and the said amount necessary to make such payment shall be paid out of general taxes to be levied for the purpose or out of any other funds that may be available.

(4) That the City of Wolf Point, Montana, shall forthwith pay into said Special Improvement Dis-

trict No. 12 Fund the further sum of $100.00, and judgment is so entered, representing the amount diverted from said Fund to pay the cost of an audit pursuant to the accounting herein and the findings of fact made by the Court; and the said amount necessary to make such payment shall be paid out of general taxes to be levied for the purpose or out of any other funds that may be available.

(5) That the City of Wolf Point, Montana, shall forthwith and hereafter account for as a part of and pay into said Special Improvement District No. 12 Fund all moneys which have been collected or which may be collected subsequent to September 2, 1930, as the proceeds of the special assessment levied against the property within and known as Improvement District No. 12 of said City; and all moneys so collected since September 2, 1930, or hereafter so collected, shall be credited to and held as a part of said Special Improvement District No. 12 Fund.

(6) That there is due and owing to the bondholder parties to this cause payable by the City of Wolf Point, Montana, together with interest at 6% per annum from January 1, 1929, but solely and only out of the Special Improvement District No. 12 Fund under the terms hereof, the amounts as follows: [112]

To Carnegie National Bank	$7500.00
To Minnie Luebbe	1500.00
To Payne Avenue State Bank	4000.00

To James G. Gleassner..... 1000.00
To Fulton County Bank..... 2500.00
To Dr. Louis D. Hyde..... 500.00

And judgment is hereby entered accordingly in favor of said parties as upon the bonds of said City issued for Improvement District No. 12 respectively held by each of said parties.

(7) That the parties hereto and hereafter named are the sole and only persons who have any claim to or rights in the Special Improvement District No. 12 Fund of the City of Wolf Point, Montana, and that said Fund and all moneys constituting a part thereof at any time under the terms hereof shall be apportioned between and paid to said parties, according to their respective holdings of bonds as found by the Court until payment thereof in full, as follows:

To Carnegie National Bank..... 75/170ths of said Fund
To Minnie Luebbe..... 15/170ths of said Fund
To Payne Avenue State Bank..... 40/170ths of said Fund
To James G. Gleassner..... 10/170ths of said Fund
To Fulton County Bank..... 25/170ths of said Fund
To Dr. Louis D. Hyde..... 5/170ths of said Fund

(8) That the said City of Wolf Point, Montana, forthwith pay out to the said bondholders in the proportions above set out all moneys in the said Special Improvement District No. 12 Fund, and shall from time to time thereafter whenever there is money in the said Fund forthwith pay and distribute the same to said bondholders in the proportions above set out.

(9) That the said bonds of the City of Wolf Point, Montana, issued for Improvement District No. 12 shall be deposited with and held by the Clerk of this Court, and shall be cancelled and delivered by said Clerk to the Treasurer of the City of Wolf Point, Montana, upon payment thereof in full or when said Special Improvement District No. 12 Fund shall be exhausted after collection in full of the said special assessment levied against the property within and known as Improvement District No. 12 of said City.

(10) That judgment be and is hereby entered against the City of Wolf Point, Montana, for the costs of these proceedings, pursuant to the Findings [113] and Conclusions of this Court, and the amount thereof shall be credited to and become a part of said Special Improvement District No. 12 Fund to be paid out under the terms hereof.

(11) That the Court now expressly reserves jurisdiction of this cause for the purpose of the further administration of said Special Improvement District No. 12 Fund and the enforcement of the terms of this judgment and decree.

Enter:

.....

Judge [114]

Thereafter, on February 10, 1939, Order of Dismissal was duly filed and entered herein, being in the words and figures following, to wit: [115]

District Court of the United States
District of Montana, Havre Division

No. 1583

CARNEGIE NATIONAL BANK, Successor to THE HANCHETT BOND COMPANY, a corporation, and MINNIE LUEBBE,

Complainants,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation; PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, a corporation; JAMES G. GIEASSNER; FULTON COUNTY BANK OF McCONNELSBURG, PA., a corporation, and DR. LOUIS D. HYDE,

Defendants.

ORDER OF DISMISSAL

Good cause not having been shown, as directed by this Court by its order of January 10, 1939, why the parties plaintiff and defendant failed to take any forward step herein for nearly six years,—that is to say from May 2, 1933 to January 10, 1939, it is ordered, and this does order, that the above-entitled action be and the same is hereby dismissed.

Done in open court at Havre, Montana, February 10, 1939.

JAMES H. BALDWIN
United States District Judge
District of Montana

[Endorsed]: Filed and entered February 10, 1939. [116]

Thereafter, on April 20, 1939, Affidavit of Arlie M. Foor was filed herein, being in the words and figures following, to wit: [117]

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Roosevelt—ss.

Arlie M. Foor, being first duly sworn upon oath, deposes and says:

That I am a duly licensed and practicing attorney in the State of Montana and duly admitted to practice law in the Federal Courts of said state.

That James H. Baldwin, United States District Judge, issued an order to show cause upon his own motion in the above entitled action that the parties, Plaintiff and Defendant appear before the court in the Federal Building at Havre, Montana at the hour of 10 o'clock in the morning on January 21, 1939 to show cause if any they have, why the said action should not be dismissed.

At the time and place set forth in said order I

personally appeared before the court in response to the ruling to show cause and objected in behalf of the Plaintiffs to dismissal of the suit for the reason that the same involved the collection of special improvement district taxes, that taxes were being paid into the fund from time to time which would be necessary for the court to make an order of distribution among the various bondholders; that the continuance of the said action was agreeable [118] to all of the Plaintiffs and Defendants. I further expressed to the court that these cases were being carried on by the parties for the reason that Robert N. Erskine, Attorney at Law, residing and practicing in the city of Chicago and representing some of the Defendants, contemplated on making a personal trip to Montana for the express purpose of working out a satisfactory solution, if possible, of the Masters decision in this case No. 1583. If and when that was done, the other three cases which involved the collection and distribution of special improvement district taxes would be considered.

No opportunity to proceed in this matter was given by the court, although the actions were pending in the Federal Court at Great Falls and had been theretofore handled by District Judge Charles N. Pray, who, so far as I know, had no objection to their pending in his court, none having ever been made by the Judge.

There are large sums of money in the city treasuries for distribution among the bond holders and

the dismissal of these actions will be detrimental to their interests.

ARLIE M. FOOR

Subscribed and sworn to before me this 18th day of April, A. D. 1939.

[U. S. Comr. Seal] CHARLES GORDON
United States Commissioner for
the State of Montana
Residing at Wolf Point, Montana.

My commission expires Feb. 1, 1943.

[Endorsed]: Filed April 20, 1939. [119]

Thereafter, on May 10, 1939, Notice of Appeal by Carnegie National Bank, was duly filed herein, being in the words and figures following, to wit: [120]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that Carnegie National Bank, a plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order dismissing the above entitled case for want of prosecution entered in this action on February 10, 1939.

CARNEGIE NATIONAL BANK
Signed: ARLIE M. FOOR
Attorney for Appellant Carnegie
National Bank
Address: Wolf Point, Montana.

[Endorsed]: Filed May 10, 1939. [121]

Thereafter, on May 10, 1939,

BOND ON APPEAL

was duly filed herein by Carnegie National Bank, being in the words and figures as follows, to wit:

[122]

Bond No. 1692736

Know all men by these presents:

That we, Carnegie National Bank, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnelsburg, Pa., a corporation, and Dr. Louis D. Hyde, or either of them, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said City of Wolf Point, State of Montana, a Municipal corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnelsburg, Pa., a corporation and Dr. Louis D. Hyde, or either of them, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 5th day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Whereas, lately at a session of the District Court of the United States for the State of Montana in a suit pending in said Court, designated as No. 1583, between Carnegie National Bank, Successor to The Hanchett Bond Company, a corporation, and Minnie Luebbe, plaintiffs, and City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnelsburg, Pa., a corporation, and Dr. Louis D. Hyde, defendants, an order was entered dismissing the said cause for want of prosecution, and the said Carnegie National Bank having filed with the said District Court a notice of appeal as provided by the Rules of Civil Procedure for the District Courts of the United States.

Now, the condition of the above obligation is such, that if the said Carnegie National Bank shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, or if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and effect.

[Seal] CARNEGIE NATIONAL BANK
[Seal] FRANK ROME
President
[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY
By JOHN KAHL,
Attorney-in-Fact

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY
By C. R. LOWERY,
Attorney-in-Fact

Attest:
T. Z. DEZKUS
Secretary [123]

Hartford Accident and Indemnity Company
Hartford, Connecticut

POWER OF ATTORNEY

Know all men by these presents, that Hartford Accident and Indemnity Company, a corporation, duly organized under the laws of the State of Connecticut, and having its principal office in the city of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint George H. Moloney, William H. Wallace, John C. Hyde, Frank J. Soukup, Sol Salins, Ward H. Hilton, Larned V. Eklund, Luman E. Williams, Lloyd E. Beach and/or John Kahl of Chicago, Illinois, its true and lawful Attorneys-in-fact, with full power and authority to each of said Attorneys-in-fact to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance

contracts where surety bonds are accepted by states or municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and to bind Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an executive officer of Hartford Acicdent and Indemnity Company and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorneys-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following By-Law adopted by the Board of Directors of Hartford Accident and Indemnity Company at a meeting duly called and held on the 2nd day of June, 1914:

Article XIII (A)

Section 2. The Executive Officers of the Company shall have power and authority to appoint for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such [124] Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given him.

Section 5. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such officers.

In witness whereof, Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 16th day of June, 1938.

[Corporate Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY

(Signed) WALLACE STEVENS
Vice-President

Attest:
(Signed) J. O. LUMMIS
Assistant Secretary

State of Conecticut,
County of Hartford—ss.

On this 16th day of June, A. D. 1938, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that

he resides in the City of Hartford, State of Connecticut; that he is the Vice-President of Hartford Accident and Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal] (Signed) A. P. WHALEN
Notary Public

My commission expires Feb. 1, 1941. [125]

State of Connecticut,
County of Hartford—ss.

CERTIFICATE

I, the undersigned, Assistant Secretary of the Hartford Accident and Indemnity Company, a Connecticut Corporation, Do hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore, that Article XIII (A), Sections 2 and 5, of the By-Laws of the Company, set forth in the Power of Attorney, is now in force.

Given under my hand and the seal of the company, at the City of Hartford, on April 17th, 1939.

[Seal] J. J. MANDLEY,
Assistant Secretary.

State of Illinois,
County of Cook—ss.

On this 17th day of April, 1939, before me, a notary public, within and for said County and State, personally appeared John Kahl, to me personally known, who being duly sworn, upon oath did say that he is the Attorney In Fact of and for the Hartford Accident and Indemnity Company, a corporation of Hartford, Connecticut, created, organized and existing under and by virtue of the laws of the State of Connecticut; that the corporate seal affixed to the foregoing within instrument is the seal of the said company; that the seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said John Kahl did acknowledge that he executed the said instrument as the free act and deed of said company.

[Seal] DAVID R. SLAUGHTER,
Notary Public, Cook County.

[Enorsed]: Filed May 10, 1939. [126]

Thereafter, on June 9, 1939, Order substituting Hazel Graham Glessner, as Executrix, etc., for James G. Glessner, was filed and entered herein being in the words and figures following, to wit: [127]

[Title of District Court and Cause.]

ORDER

Upon written motion of Hazel Graham Glessner suggesting the death of James G. Glessner, one of the defendants herein, and asking to be substituted,

It Is Ordered that the death of the defendant James G. Glessner, be noted upon the records and that Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, be substituted for the said James G. Glessner as a defendant in the above entitled proceedings.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and Entered June 9, 1939. [128]

Thereafter on May 10, 1939, Notice of Appeal of Hazel Graham Glessner, as Executrix, etc., was duly filed herein, being in the words and figures following towit: [129]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, a defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order dismissing the above

entitled case for want of prosecution entered in this action on February 10, 1939.

HAZEL GRAHAM GLESSNER,
Executrix of Estate of James G. Glessner, Dec'd.

Signed: CHARLES GORDON,
Address: Wolf Point, Montana.

Signed: ROBERT N. ERSKINE,
Address: Chicago, Illinois.

Attorneys for Appellant Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased.

[Endorsed]: Filed May 10, 1939. [130]

Thereafter, on May 10, 1939,

BOND ON APPEAL,

of Hazel Graham Glessner, as Executrix, etc., was duly filed herein, being in the words and figures following, towit: [131]

Bond No. 1692737

Know All Men By These Presents:

That we, Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto City of Wolf Point, State of Montana, a municipal corporation, and to each and all of the several other parties, jointly and severally, to those

certain proceedings hereafter designated, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said City of Wolf Point, State of Montana, a municipal corporation, or to any or all of said parties to said proceedings, jointly or severally, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 5th day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Whereas, lately at a session of the District Court of the United States for the State of Montana in a suit pending in said Court, designated as No. 1583, between Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, and Minnie Luebbe, plaintiffs, and City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnelsburg, Pa., a corporation, and Dr. Louis D. Hyde, defendants, an order was entered dismissing the said cause for want of prosecution, and the said Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, having filed with the said District Court a notice of appeal as provided by the Rules of Civil Procedure for the District Courts of the United States.

Now, the condition of the above obligation is such,

that if the said Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, shall prosecute her said appeal to effect, and shall answer all damages and costs that may be awarded against her if she fail to make her plea good, or if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and effect.

HAZEL GRAHAM GLESSNER,
Executrix of Estate of James G. Glessner, Deceased.

[Seal] By ROBERT N. ERSKINE,
Her Attorney-in-fact.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By JOHN KAHL,
Attorney-in-fact.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By C. R. LOWERY,
Attorney-in-fact. [132]

POWER OF ATTORNEY

Know All Men By These Presents:

That I Hazel Graham Glessner, Executrix of the Estate of James G. Glessner, deceased, late of York, Pa. do hereby appoint Robert N. Erskine of Chicago, Illinois, my attorney and agent for me and in my name to prosecute or enforce or to defend and answer all actions or other legal proceedings

relating to Improvement Bonds issued by the City of Wolf Point, Montana; and particularly to act for me and in my name in those certain proceedings in the United States District Court for the District of Montana presently entitled: Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, et al. vs. The City of Wolf Point, Montana, a muncipal corporation, and others, therein pending as Case No. 1583 and in any appeal from such proceedings to the Circuit Court of Appeals to the Ninth Circuit, specifically to include the execution and filing of any notice of appeal, appeal bond with surety, designation of contents or record on appeal, assignment of errors, and any other document required to be signed and filed in such proceedings; and generally to act as my attorney and agent in such proceedings; and to do all such acts and things as fully and effectually in all respects as I my self could do if personally present; and I hereby for myself, my heirs, executors, and administrators, ratify and confirm and agree to ratify and confirm whatsoever my said attorney shall do by virtue of these presents.

In Witness Whereof I have hereunto set my hand and seal this Fifth day of May, A. D. 1939.

[Seal] HAZEL GRAHAM GLESSNER,
Executrix of the Estate of
James G. Glessner, deceased,
late of York, Pa. [133]

Hartford Accident and Indemnity Company
Hartford, Connecticut

POWER OF ATTORNEY

Know All Men By These Presents, That Hartford Accident and Indemnity Company, a corporation, duly organized under the laws of the State of Connecticut, and having its principal office in the city of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint George H. Moloney, William H. Wallace, John C. Hyde, Frank J. Soukup, Sol Selins, Ward H. Hilton, Larned V. Eklund, Luman E. Williams, Lloyd E. Beach and/or John Kahl of Chicago, Illinois, its true and lawful Attorneys-in-fact, with full power and authority to each of said Attorneys-in-fact to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and to bind Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive officer of Hartford Accident and Indemnity Company and sealed and at-

tested by one other of such officers, and hereby ratifies and confirms all that its said Attorneys-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following By-Law adopted by the Board of Directors of Hartford Accident and Indemnity Company at a meeting duly called and held on the 2nd day of June, 1914:

Article XIII (A)

Section 2. The Executive Officers of the Company shall have power and authority to appoint for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such [134] Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given him.

Section 5. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such officers.

In Witness Whereof, Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 16th day of June, 1938.

[Corporate Seal]

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

(Signed) WALLACE STEVENS,
Vice-President.

Attest:

(Signed) J. O. LUMMIS,
Assistant Secretary.

State of Connecticut,
County of Hartford—ss.

On this 16th day of June, A. D. 1938, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Vice-President of Hartford Accident and Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal]

(Signed) A. P. WHALEN,
Notary Public.

My commission expires Feb. 1, 1941. [135]

CERTIFICATE.

State of Connecticut,
County of Hartford,—ss.

I, the undersigned, Assistant Secretary of the Hartford Accident and Indemnity Company, a Connecticut Corporation, Do hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore, that Article XIII (A), Sections 2 and 5, of the By-Laws of the Company, set forth in the Power of Attorney, is now in force.

Given under my hand and the seal of the company, at the City of Hartford, on April 17th, 1939.

[Seal] J. J. MANDLEY
Assistant Secretary

State of Illinois,
County of Cook,—ss.

On this 17th day of April, 1939, before me, a notary public, within and for said County and State, personally appeared John Kahl, to me personally known, who being duly sworn, upon oath did say that he is the Attorney In Fact of and for the Hartford Accident and Indemnity Company, a corporation of Hartford, Connecticut, created, organized and existing under and by virtue of the laws of the State of Connecticut; that the corporate seal affixed to the foregoing within instrument is the seal of the said company; that the seal

was affixed and the said instrument was executed by authority of its Board of Directors; and the said John Kahl did acknowledge that he executed the said instrument as the free act and deed of said company.

[Seal] DAVID R. SLAUGHTER
Notary Public, Cook County.

[Endorsed]: Filed May 10, 1939. [136]

Thereafter, on June 5, 1939, Designation of Portions of the Record to be contained in the Record on Appeal, was duly filed herein, being in the words and figures following, towit: [137]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD OF APPEAL

Now come Carnegie National Bank and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, parties to the above proceedings, who have filed herein respectively Notice of Appeal and now hereby designate to the said District Court the following portions of the record and proceedings in the above entitled cause to be contained in the record on appeal to be filed pursuant to such notice, as follows:

1. Amended Bill of Complaint, excluding Exhibits 1 and 2, filed May 22, 1930.

2. Answer of City of Wolf Point, excluding Exhibit A, filed September 2, 1930.

3. Order of November 17, 1930, appointing Special Master.

4. Order of November 17, 1930 for service on absent defendants.

5. Answer of defendants, Payne Avenue State Bank, et al., filed January 12, 1931.

6. Report and recommendations of Special Master filed November 12, 1932.

7. Exceptions of City of Wolf Point to Special Master's Report filed November 25, 1932.

8. Order of December 14, 1932, allowing Special Master's Fees.

9. Exceptions to Master's Report by Complainant filed January 9, 1933.

10. Order of January 10, 1933, substituting Carnegie National Bank as plaintiff.

11. Order of January 10, 1933, vacating default of A. W. Schreiber and substituting Minnie Luebbe in place of A. W. Schreiber.

12. Order of January 10, 1933, to amend answer.

13. Order of January 10, 1933, for payment of certain money to bondholders.

14. Decision on Special Master's Report filed May 2, 1933.

15. Order of January 10, 1939, to show cause.

16. Answer to order to show cause with objec-

tions to dismissal and request for finding filed January 21, 1939.

17. Order of January 21, 1939, case submitted to the court and taken under advisement, counsel to submit proposed findings, etc.

18. Proposed Findings and Conclusions lodged February 10, 1939.

19. Decree lodged February 10, 1939.

20. Order of February 10, 1939, for dismissal of case.

21. Affidavit of Arlie M. Foor, solicitor of complainant.

22. Notice of Appeal of Carnegie National Bank.

23. Appeal Bond of Carnegie National Bank.

24. Order, substituting Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased.

25. Notice of Appeal of Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased.

26. Appeal Bond of Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased.

Wherefore, said appellants pray that the record of the United States District Court for the State of Montana in said cause be prepared accordingly

and filed in the Circuit Court of Appeals for the Ninth Circuit.

CARNEGIE NATIONAL BANK
HAZEL GRAHAM GLESSNER
as Executrix of the Estate of James G. Glessner
By ARLIE M. FOOR
Attorney for Carnegie National Bank
ROBERT N. ERSKINE
CHARLES GORDON
Attorneys for Hazel Graham Glessner as Executrix of the Estate of James G. Glessner, Deceased.

[Endorsed]: Filed June 5, 1939 [138]

Thereafter, on July 5, 1939, Motion for Dismissal was duly filed herein, being in the words and figures following, towit: [139]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL.

Comes now the above named defendant, City of Wolf Point, and moves this Honorable Court to Dismiss the above entitled action for want of prosecution pursuant to Rule 48-3 of rules of this court for the reason that no forward step has been taken

in said cause by the Complainant therein for a period of more than one year.

This motion is made upon the files and records in said action.

Dated this 12th day of May, 1934.

FRANK M. CATLIN
H. C. HALL.
E. J. McCABE
Attorneys for Defendant, City of Wolf Point.

Indorsed on back:

Due service of the within Motion for Dismissal is hereby acknowledged at Wolf Point, Montana, this 14th day of May, 1934.

MARRON & FOOR
By ARLIE M. FOOR,
Attorneys for Complainant.

[Endorsed]: Filed July 5, 1939. [140]

Thereafter, on July 5, 1939, Notice of Hearing on Motion to Dismiss was filed herein, being in the words and figures following, towit: [141]

[Title of District Court and Cause.]

NOTICE OF HEARING.

To the above named plaintiff and to Arlie M. Foor and Robert M. Erskine, its solicitors of record:

You and each of you will please take notice that on the 22nd day of May, 1934, at the hour of ten

o'clock, A. M. of said day or as soon thereafter as counsel may be heard at the Court Room of the above entitled Court at Great Falls, Cascade County, Montana, the defendant, City of Wolf Point, will call up for hearing and determination its motion to dismiss the above cause for want of prosecution, a copy of which said motion is herewith served upon you.

Dated this 12th day of May, 1934.

FRANK M. CATLIN.
H. C. HALL
E. J. McCABE
Attorneys for Defendant, City of Wolf Point.

Due service of the within notice of hearing is hereby acknowledged at Wolf Point, Montana, this 14th day of May, 1934.

MARRON & FOOR,
By ARLIE M. FOOR,
Attorneys for Complainant.

[Endorsed]: Filed July 5, 1939. [142]

Thereafter, on July 5, 1939, Affidavit of H. C. Hall was duly filed herein, being in the words and figures following, towit: [143]

[Title of District Court and Cause.]

AFFIDAIT OF H. C. HALL.

United States of America
State and District of Montana,
County of Cascade.—ss.

H. C. Hall, being first duly sworn, deposes and says:

That at all times since the commencement of the above entitled action he has been and now is one of the attorneys for the defendant, City of Wolf Point, in the above entitled action, and makes this affidavit for and on behalf of said defendant for the reason that he is familiar with the facts and matters hereinafter set forth.

That the report of the special master appointed by the court to hear the evidence was filed and entered in said action on November 12th, 1932. That thereafter, exceptions were filed to such report and on May 2nd, 1933 the decision of the court on such exception matters; report and objections filed thereto was duly made and entered, and notice thereof given to counsel for complainants and defendants. That thereafter no forward step was taken by the complainants for more than a year and on or about the 14th day of May, 1934 counsel for the defendant, City of Wolf Point,

served upon the attorneys for the complaints motion to dismiss said cause for want of prosecution, and noticed said motion for hearing on the 22nd day of May, 1934, all of which appears from the record in said action. That immediately thereafter and upon the urgent telephonic request of one of the attorneys for the complainants, the hearing on said motion to dismiss was continued, and said attorney agreed to take immediate steps to present to the court findings of fact, conclusions of law and proposed decree, it being understood that such presentation would take place not later than sometime during the middle of the month of July, 1934. [144]

That sometime in the month of June, 1934 copies of proposed findings of fact and conclusions of law and decree were received by the attorneys for the defendant, City of Wolf Point, who thereupon immediately advised the attorneys for the complainants that they were dissatisfied therewith, and that the matter could be taken up with the court and the attorneys for complainants in the month of July, 1934, and that hearing upon the motion to dismiss for want of prosecution would be delayed until such conference was had.

That nothing further was done by the attorneys for the complainants with reference to such findings of fact, conclusions of law and decree, either by way of presentment to the court or conference with the attorneys for the defendant until February

10th, 1939, in response to an order issued by the court on January 10th, 1939, to show cause why said action should not be dismissed for want of prosecution. That neither said defendant, city of Wolf Point, nor its attorneys, have at any time agreed or consented to the delay in said action, and have at all times desired that the attorneys for the complainant move promptly in the prosecution of said action.

That attached hereto and by this reference made a part hereof, is a letter from one of the attorneys for the complainants with reference to findings of fact, conclusions of law and proposed decree, received by counsel for the defendant on or about June 6th, 1934.

H. C. HALL

Subscribed and sworn to before me this 5th day of July, 1939.

[Notarial Seal] EDW. C. ALEXANDER
Notary Public for the State of Montana.
Residing at Great Falls, Montana.

My commission expires Sept. 11, 1941.

[Endorsed]: Filed July 5, 1939. [145]

Wolf Point, Montana
June 5th, 1934.

Hall & McCabe,
Attorneys at Law,
Strain Building,
Great Falls, Montana.

In re: Hanchett Bond v. City of Wolf Point, et al.
Attention: Mr. Hall

Dear Sirs:

This will acknowledge receipt of your favor of the 4th inst., regarding a receipt of copy of proposed findings of fact, conclusions of law, and decree in cases 1583 and 1887. Mr. Erskine plans on being in Montana sometime during the middle of July, and if it would be agreeable to you, I am sure it would be advantageous to all parties concerned to wait until that time so that if there are any changes which you desire to make, they could be gone over and agreed upon without contesting the matter before the court. We hope to have the Poplar cases ready for hearing at that time and Mr. Erskine will be here for that purpose. The exact date has not been determined as yet, but he expects to be here a week before they are set for hearing.

Thank you for your many courtesies extended to this office.

MARRON & FOOR
By: FOOR

AMF:m [146]

Thereafter, on July 5, 1939, Designation of Additional Portions of Record to be contained in record on Appeal, was duly filed herein, being in the words and figures following, to wit: [147]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

Comes now the above named defendant, City of Wolf Point, State of Montana, a municipal corporation, and hereby designates to said district court the following additional portions of the record and proceedings in the above entitled cause to be contained in the record on appeal to be filed pursuant to said notice of appeal heretofore filed in said action, to wit:

(1) Motion for dismissal, dated May 12th, 1934.

(2) Notice of hearing on motion for dismissal dated May 12th, 1934.

(3) Affidavit of H. C. Hall, filed July 5th, 1939.

Dated this 5th day of July, 1939.

FRANK M. CATLIN,
Wolf Point, Montana.
HALL & ALEXANDER,
Great Falls, Montana.
Attorneys for defendant,
City of Wolf Point.

[Endorsed]: Filed July 5, 1939. [148]

Thereafter, on June 9, 1939, Order extending time to file record on appeal in Circuit Court of Appeals, was filed and entered herein, said original order being hereto annexed, and is in the words and figures following, to wit: [149]

[Title of District Court and Cause.]

ORDER.

On reading and filing the affidavit of Arlie M. Foor duly verified the 25th day of May, A. D. 1939 and on motion of Arlie M. Foor, Attorney for the Complainants, it is:

Ordered that the time for the complainants to print and docket the case and file the record be, and the same hereby is, extended to and including the 9th day of August 1939, and the term of this court is extended to the 9th day of Aug., 1939.

CHARLES N. PRAY
United States District Judge

[150]

[Endorsed]: Filed and entered June 9, 1939. [151]

[Title of District Court.]

United States of America
District of Montana—ss.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States

Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 152 pages, numbered consecutively from 1 to 152 inclusive, is a full, true and correct transcript of all matter designated by the parties as the record on appeal in case No. 1583, Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, vs. City of Wolf Point, Montana, et al., as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Thirty-four and 30/100 Dollars, ($34.30), and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 24th day of July, A. D. 1939.

[Seal] C. R. GARLOW,
Clerk of the United States District Court
By C. G. KEGEL
Deputy. [152]

[Endorsed]: No. 9248. United States Circuit Court of Appeals for the Ninth Circuit. Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, Appellant, vs. City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a Corporation, Hazel Graham Glessner,

as Executrix of the Estate of James G. Glessner, Deceased, Fulton County Bank of McConnelsburg, Pa., a Corporation, and Dr. Louis D. Hyde, Appellees, and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, Appellant, vs. City of Wolf Point, State of Montana, a Municipal Corporation, Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, Payne Avenue State Bank of St. Paul, Minnesota, Fulton County Bank of McConnelsburg, Pa., and Dr. Louis D. Hyde, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed July 29, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 9248

CARNEGIE NATIONAL BANK, Etc.,
Appellant,

vs.

CITY OF WOLF POINT, Etc., Et al.

STATEMENT OF POINTS RELIED UPON.

Whereas, the District Court by its order of February 10, 1939, dismissed this cause, as for want

of prosecution, and an appeal has been perfected from such order of dismissal,

Now, therefore, the appellants, Carnegie National Bank and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, now give notice that they intend to rely on this appeal on the following points:

1. The entry of such order of dismissal was erroneous when all parties were in open court, by personal appearance or by written answer, to a rule to show cause, and both the plaintiff and certain of the defendants urged further appropriate proceedings.

2. The entry of such order of dismissal was erroneous upon the state of the record, a full hearing having been had, a decision of the District Court having been announced and the cause being ready for final disposition.

3. The entry of such order of dismissal was erroneous upon the state of the record, a full hearing having been had, a decision of the District Court having been announced and there being presented to the court for adoption and final entry a decree with findings of fact and conclusions of law.

4. The entry of such order of dismissal was erroneous for the reason that the decree together with the findings of fact and conclusions of law presented to the court should have been duly filed and entered of record.

5. The entry of such order of dismissal was erroneous for the reason that this cause was pending before the Honorable Charles N. Pray, one of the judges of the District Court for Montana, by whom all orders in the case had been entered and who had heard exceptions to the Master's report in said cause and filed his memorandum decision thereon, and, therefore, it was improper for another judge of said court to assume jurisdiction, entering a rule to show cause and an order of dismissal.

Wherefore, the appellants pray that said order of dismissal entered in said cause be vacated and set aside and that said cause be returned to the District Court for further proceedings pursuant to the record therein; and your appellants will ever pray.

CARNEGIE NATIONAL BANK
HAZEL GRAHAM GLESSNER,
as Executrix of the Estate of
James G. Glessner, Deceased.
By ARLIE M. FOOR
ROBERT N. ERSKINE
Their Attorneys.

[Endorsed]: Filed Aug. 7, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED.

Now come Carnegie National Bank and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, as appellants, by Arlie M. Foor and Robert N. Erskine, their attorneys, and now hereby declare that the entire record as filed in the above court is necessary for the consideration of the questions presented upon this appeal, and such entire record should be printed accordingly.

ARLIE M. FOOR
ROBERT N. ERSKINE
Attorneys for Appellants.

[Endorsed]: Filed Aug. 7, 1939. Paul P. O'Brien, Clerk.

No. 9248

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

2

CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, A CORPORATION, HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED, FULTON COUNTY BANK OF McCONNELSBURG, PA., A CORPORATION, AND DR. LOUIS D. HYDE,
Appellees.

AND

HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, FULTON COUNTY BANK OF McCONNELSBURG, PA., AND DR. LOUIS D. HYDE,
Appellees.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR APPELLANTS.

ARLIE M. FOOR,
Wolf Point, Montana,
ROBERT N. ERSKINE,
Chicago, Illinois,
Counsel for Appellants.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 9248

CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, A CORPORATION, HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED, FULTON COUNTY BANK OF McCONNELSBURG, PA., A CORPORATION, AND DR. LOUIS D. HYDE,
Appellees.

AND

HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED,
Appellant,

vs.

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, FULTON COUNTY BANK OF McCONNELSBURG, PA., AND DR. LOUIS D. HYDE,
Appellees.

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR APPELLANTS.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

The District Court had jurisdiction.

(Section 41 and Section 118, Title 28, United States Code)

There was diversity of citizenship; the complainant, a corporation of New Jersey, had its principal place of business in Illinois and was not a resident of Montana; and the defendant, City of Wolf Point, was a municipality in and of Montana (Rec. 3-4).

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. The bill of complaint sought an accounting of the proceeds of special assessments alleged to constitute a trust fund pledged to the payment of $17,000 of outstanding bonds (Rec. 3). The answer of the City of Wolf Point admitted uncollected and delinquent assessments amounting to $7,890.08 (Par. VIII, Rec. 25), and a balance of cash on hand in the sum of $6,273.34 (Par. XI, Rec. 27). The Master's report shows that the city tendered in open court the sum of $6,710.39 (Rec. 62), and that a substantial sum remained due on delinquent assessments and from the purchase price of lots sold on tax deed (Rec. 63). The Master found that the city had on hand $11,032.24 for which it was liable, and that it was also liable for a certain additional sum (Rec. 73).

The court had jurisdiction of the defendant bondholders pursuant to said Section 118, the order of the District Court requiring such parties to appear (Rec. 34), and the voluntary appearance and answer of said defendants (Rec. 36).

The Circuit Court of Appeals has jurisdiction to review an order of dismissal for want of prosecution for the reason that it is a final appealable order.

Section 225, Title 28, United States Code.
Colorado Eastern Railway Company v. *Union Pacific Railway Company,* 94 Fed. 312.
Ruff v. *Gay,* 67 Fed. (2nd) 684.

Notices of appeal from the order of February 10, 1939, dismissing the case for want of prosecution, were duly filed (Rec. 123, 131) on May 10, 1939, in accordance with Section 230, Title 28, United States Code and Rule 73 of Federal Rules of Civil Procedure. Both appellants filed appeal bonds (Rec. 124, 132).

STATEMENT OF THE CASE.

The bill of complaint herein sought an accounting of certain special assessment funds alleged to have been levied and collected by the City of Wolf Point applicable to the bonds held by complainant and others. The city was charged with the misapplication of some of such funds, with wrongful administration, and with failure to act in accordance with law for the collection and enforcement of such special assessments and for the payment of such bonds. It was further alleged that some of such assessments remained unpaid and that the lien of the assessments remained to be satisfied as to some lands. It was further alleged that the city was a trustee, the said special assessments and the proceeds thereof constituting trust funds, and that the city had in numerous respects failed in its duties and obligations as such trustee. Relief was sought by the complainant as beneficiary of such trust funds; and all other holders of bonds were made parties,

likewise as beneficiaries. The bill of complaint also alleged that all bonds, by the terms thereof, were payable in numerical order (Rec. 3-22).

The answer of the city admitted the levy of the assessments and the issuance of bonds; asserted that the bonds were payable in order of registration rather than numerically, and admitted that $17,000 of bonds remained outstanding; admitted that a substantial amount of assessments remained delinquent; admitted the collection of substantial funds with $6,273.34 on hand, but denied any misappropriation or diversion, denied all other wrongdoing and the breach of any duty as trustee, and in fact, denied that the city was a trustee with duties as such (Rec. 23-32).

The answer of defendant bondholders admitted substantially the allegations of the bill of complaint except they denied the duty of the city to call and pay in full any bonds after any installment of the assessment was in default, and it was alleged that each and all of the installments had not been collected in full but remained in partial default; that interest coupons were payable only out of interest collected on assessments, whereas, the city had paid interest coupons with principal; that bonds had no priority by reason of the number or registration, but were entitled to pro rata payments after any default; and further, that the lien of assessments remains fixed until payment in full, and that any attempts to give title to lands free and clear of such lien would constitute a taking of property and an impairment of contract contrary to certain provisions of the Constitution of the United States (Rec. 36-42).

The case was duly referred to a Special Master in Chancery who, in due course, filed his report and recommen-

dations (Rec. 43-74). This report shows extended hearings (Rec. 44-5) and a very voluminous record which "called for exhaustive calculations and extensive tabulations" (Rec. 54).

The Master found that the moneys derived from special assessments were irrevocably pledged to the payment of bonds, constituting trust funds whether the city be regarded as a trustee or as an agent of bondholders (Rec. 54); that bonds were called and paid in numerical order, and also in part in order of registration, although only a part of those registered on a particular date were called and paid (Rec. 56); that certain moneys had been diverted (Rec. 57); that there were certain irregularities or administrative failures (Rec. 60-1); and that delinquent assessments and the proceeds of tax sales remained to be collected, but that the total amount thereof would not be sufficient to pay in full all bonds (Rec. 63).

The Master held as conclusions of law that the bonds did not create a personal liability of the municipality except for funds actually collected (Rec. 64); that the funds collected constituted trust funds "to be used exclusively for the retirement of bonds and interest" (Rec. 65); that the duties of the city as to the collection of assessments were passive rather than active and that the city "is a mere conduit for receiving moneys belonging to the district and passing them on to the bondholders"; and in any event that the evidence failed to establish that bondholders have suffered any loss "by reason of the acts of the city," except as specifically declared (Rec. 66-69).

The Master's recommendations were that subsequent collections should be prorated; that the bondholders should have judgment for the amount of money on hand in the sum of $11,032.24, plus interest on certain diverted funds,

to be prorated; that the payment of such amounts should be enforced from time to time upon proper showing; and that complainant and all bondholders have judgment for costs (Rec. 72-3).

Exceptions to such report and recommendations were filed by the City of Wolf Point (Rec. 75) and by the complainant and other bondholders (Rec. 79). Hearing was had on such exceptions and the case was taken under advisement by the court pursuant to order of January 10, 1933 (Rec. 85). By such order the City of Wolf Point was required, without objection on its part, to pay in pro rata proportion upon all bonds the sum of $4,590, constituting a portion of the funds in the amount of $6,710.39 which the city admitted to hold and had tendered in open court (Rec. 86).

In due course, on May 2, 1933, the court filed a memorandum decision which approved the Master's report except as modified as to interest payable after maturity on the bonds (Rec. 87-91). There is no record of any further proceedings in the cause until January 10, 1939. All of the foregoing proceedings were had before, and every order hereinabove referred to was entered by the Honorable Charles N. Pray, as Judge of the District Court of Montana presiding at Great Falls, Montana (Rec. Orders 33, 34, 78, 82, 83, 84, 85, 87). The amended bill of complaint herein was specifically filed to the Great Falls division before Judge Pray (Rec. 3).

On January 10, 1939, the Honorable James H. Baldwin entered an order at Helena, Montana, requiring the parties plaintiff and defendant to appear before the court at Havre, Montana, on January 21, 1939, to show cause why the action should not be dismissed (Rec. 91). On the return day of such rule a written answer to such order to

show cause was filed by the attorney for defendant bondholders in their behalf (Rec. 92). The attorney for complainant appear in person, objecting to the dismissal; and tendered to the court findings of fact and conclusions of law, with a decree; whereupon the matter was taken under advisement by the court (Rec. 95-96). Thereafter on February 10, 1939, the said Judge, Honorable James H. Baldwin, lodged with the Clerk the said findings of fact and conclusions of law (Rec. 97), and the decree (Rec. 115); and filed, and there was entered an order of dismissal (Rec. 120) in words as follows:

> "Good cause not having been shown, as directed by this Court by its order of January 10, 1939, why the parties plaintiff and defendant failed to take any forward step herein for nearly six years,—that is to say from May 2, 1933 to January 10, 1939, it is ordered, and this does order, that the above entitled action be and the same is hereby dismissed.
>
> Done in open court at Havre, Montana, February 10, 1939.
>
> JAMES H. BALDWIN,
> *United States District Judge*
> *District of Montana"* (Rec. 120).

There is but one ultimate question before the court upon this appeal, and that is whether or not, under the facts and circumstances of this case, such order of dismissal should have been entered.

Errors Relied Upon.

This order of the District Court of February 10, 1939, dismissing this action as for want of prosecution, was improvidently and erroneously entered for the following reasons:

1. The cause had been fully prosecuted, and decision had been announced, with nothing remaining to be done prior to entry of decree except the entry of record of the court's findings of fact and conclusions of law, pursuant to Rule 70½ of the Rules of Equity as promulgated November 4, 1912, by the Supreme Court of the United States, and then in force.

2. Such findings of fact and conclusions of law, together with a decree, had been prepared and were before the court for appropriate entry.

3. Parties were before the court asking further appropriate proceedings and final disposition of the cause.

4. The facts and circumstances disclosed by the record as now before the court made a final disposition of the cause necessary to all parties, and it was equally the duty of the complainant and all defendants to procure entry of such findings of fact and conclusions of law, and a decree, for the following reasons:

A. The record before the court at this time includes both pleadings and the Master's report as approved by the District Court, and the correctness of the Master's report is not now at issue.

B. The subject matter of the litigation consisted of a trust fund held by the City of Wolf Point.

C. The duties and obligations of the City of Wolf Point and the rights of all parties pertaining to such trust funds were questions at issue.

D. The Master's report had presented findings, conclusions, and recommendations upon all such issues, granting relief to bondholders in some respects but absolving the city as a trustee from liability or responsibility in many other respects.

E. The city admittedly held certain funds and would collect additional funds, and the distribution of these funds was not only a question at issue but had been partially accomplished by order of court without objection from the city.

F. A dismissal of the action will leave the city, in its capacity as trustee or collecting agent, without any judicial construction of its duties and obligations but with a balance of funds on hand, after partial distribution of funds contrary to the city's concept of its duty.

G. The city had tendered to the court a certain admitted balance of funds on hand and, although such funds were left in the possession of the city, nevertheless, in legal contemplation they were within the custody and control of the court.

5. Upon the state of the record the judge who entered the order of dismissal did not exercise his power to act with sound judicial discretion.

6. The order of dismissal which was entered upon the court's own motion does not indicate whether or not it was without prejudice to any further action or adjudication.

7. The Honorable James H. Baldwin, in the exercise of the usual judicial courtesy and comity as between judges of the same court, should not have assumed jurisdiction to dismiss the action, when the cause had been fully heard before the Honorable Charles N. Pray, still a judge of said

District Court, by whom all previous orders had been entered and a memorandum decision confirming the Master's report had been filed, and who alone should enter of record findings of fact and conclusions of law, and a decree.

Summary of Argument.

The only question before the court is whether the dismissal for want of prosecution was proper.

The inherent power of the court to dismiss should be exercised with sound judicial discretion.

Decision must be made according to the facts and circumstances disclosed by the record as it stands.

There was no rule to speed and no mandatory requirement.

Rule 41 of Federal Rules of Civil Procedure not involved.

A decision on the merits after trial is the purpose of litigation.

A dismissal for want of prosecution permits another suit.

Dismissal not justified under many other decisions.

Dismissal is not mandatory even with positive statutory requirements.

Facts and circumstances of this case:

A completed trial.
Master's report approved.
Partial adjudication and distribution of money.

Decree on the merits necessary and proper for all.

Dismissal untimely and inequitable.

There should be no conflict of jurisdiction between judges of concurrent authority under rules of comity and judicial courtesy recognized by the decisions of all courts.

Litigation pending before one judge should be continued before him to a final conclusion.

A trial upon the merits, and proceedings to the point of a final conclusion, had been completed before Judge Charles N. Pray.

Dismissal for want of prosecution by Judge James H. Baldwin was improper.

ARGUMENT.

The appellants urge that it was error for the District Court to dismiss this action for want of prosecution. That is the only question now before this court. There can be no real dispute as to questions of law. We believe the decision of this court involves only the application of the law to the record now before this court. We want no misunderstanding of our position on the law.

Unquestionably, the law is that any court has inherent power, without regard even to any statute or rule of court, to dismiss any action pending therein for want of prosecution; but

The exercise of that power shall be with sound judicial discretion and not arbitrarily.

We recognize that when there is any suggestion of an abuse of discretion or arbitrary action then there is a particularly heavy burden on appellant. We accept that burden with the firm belief that a consideration of the record before the court will require a reversal of the order of dismissal to permit a termination of this litigation upon the merits of the case.

We shall make no attempt to review all decisions, even of federal courts, upon the question of the power of the court to dismiss. As disclosed by the digests of law in common use, upon the subject of dismissal (involuntary), a mass of cases can be cited sustaining such power of the court with none to the contrary (*e.g.,* 18 Corpus Juris 1191-1203 and Fourth Decennial Digest, Dismissal and Non-Suit, section 60). In passing, however, we note that

in almost all cases, wherein there was a dismissal for want of prosecution, there had been no trial on the merits whatever. We shall not impose on the court to discuss all those cases where courts have held that a dismissal was improper. Our presentation of cases will be rather for purposes of illustration in considering the record before the court, and determining why such an order of dismissal was entered, and whether it should have been entered.

The sole question before this court is whether upon the record a dismissal was justified, and our discussion must be primarily directed to the facts and circumstances of the record. We think it cannot be controverted that the record must be considered as it now stands; that is, upon the pleadings, the Master's report, and the memorandum decision of the District Court sustaining such report. Whether or not there were errors in that report, and whether or not the District Court erred in such decision, are questions not now before this court. We urge that the Master's report must be considered for the purpose of determining whether it presents a prima facie state of facts requiring a final decree thereon for the benefit of all parties.

It is true that such memorandum decision was filed May 2, 1933. From the record it appears that there was no further action of any kind by any party, or by the court, until the court on its own motion on January 10, 1939, entered an order to show cause directed to all parties plaintiff and defendant (Rec. 91). In response to such Rule a written answer was filed (Rec. 92), and counsel for plaintiff appeared in open court (Rec. 96). We submit that the written answer is not alone to be considered, nor is the fact that counsel for plaintiff objected in open court. The entire record should be examined. We may concede that the attorneys were gravely at fault in failing to bring the matter before the court for final disposition; neverthe-

less, on the return day of the Rule there was presented to the court findings of fact and conclusions of law (Rec. 97), and a decree (Rec. 115). Regardless of even unreasonable delay, the defendant, City of Wolf Point, has not been injured thereby, and it would seem important that the duties and obligations of such defendant city should be established.

No Rule to Speed or Mandatory Requirement.

We deem it proper to call to the attention of the court these facts: It is apparent from the record that there had been no Rule on complainant to proceed, and there was no trial calendar or general call on which the case appeared in regular order.

In the case of *Buck* v. *Felder,* 208 Fed. 474, the court, recognizing the inherent power of the court to dismiss, nevertheless declared (477):

> "In general, however, the practice is that a rule on the complainant to proceed in the cause, commonly called a rule to speed, must precede a motion to dismiss for want of prosecution." (Citing 14 Cyc. 448 and cases.)

In the case of *Maison Dorin, Société Anonyme* v. *Arnold,* 16 Fed. (2nd) 977 (certiorari denied by United States Supreme Court, 273 U. S. 766, 71 L. Ed. 881), it was held that where a case was dismissed on a regular call, it was not an abuse of discretion to reinstate such case on the trial calendar, even after term had expired, where the court found that the order of dismissal was entered inadvertently and worked an unjust hardship. The court there held that Rule 57 of the Rules in Equity, then in force, was not ironclad and the courts were free to exercise some discretion thereunder. Such rule provided that a case

might be dropped from the trial calendar by stipulation and upon order, but if not reinstated within the year the suit should be dismissed without prejudice to a new one. It will be observed that these provisions of Rule 57 are not contained in the Federal Rules of Civil Procedure now in force.

Rule 41—Federal Rules of Civil Procedure—Not Involved.

We would also call attention to Rule 41 of the Federal Rules of Civil Procedure now in force. Under paragraph (a) of this rule a case cannot be dismissed upon motion of plaintiff, after answer filed, "save upon order of the court and upon such terms and conditions as the court deems proper." We then particularly call attention to paragraph (b) of such rule, reading as follows:

> "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

It will be observed that this paragraph contemplates a motion for dismissal by defendant in the event of plaintiff's failure to prosecute, and unless otherwise ordered any such dismissal is an adjudication upon the merits.

Neither Rule 41, nor any other provision of such rules, specifically contemplates a dismissal for want of prosecution upon the court's own motion, and the question is left open whether the present dismissal is without prejudice to further action. We do not pretend that the absence of any such provision in the present rules denies to the court the inherent power to dismiss, but we do believe that the nature of these new Federal Rules of Civil Procedure upon this question of involuntary dismissal emphasizes reasons why the order for dismissal now before the court should be reversed.

Documents Filed After Dismissal No Part of Record.

This dismissal followed a rule to show cause entered by the court on its own motion. Even upon the return day of such rule, it does not appear from the record that the attorney for the defendant city urged the dismissal (Rec. 95-96). However, it seems advisable at this time to comment upon certain instruments which now appear as a part of the record, consisting of a purported motion for dismissal (Rec. 143), notice of hearing (Rec. 144), affidavit of H. C. Hall (Rec. 146), and designation of record (Rec. 150). We must most respectfully urge that these instruments are no proper part of this record. The order of dismissal appealed from was entered February 10, 1939, and that order concluded the case and ended the record except as the court itself might certify any finding of fact or certificate of evidence. We think that proposition is fundamental. Pursuant to such order, notice of appeal was filed on May 10, 1939 and appellant's designation of record was filed June 5, 1939. The instruments above described (Rec. 143-150) were not filed with the Clerk of the District Court until July 5, 1939, and then without any order of court. We note in passing that the

purported notice of hearing, although directed to Robert N. Erskine, Solicitor for certain defendants, does not purport to have been served on him (Rec. 145). From the record before the court, it is clearly apparent that the said motion for dismissal which was to have been presented to the court according to the notice of hearing on May 22, 1934 was in fact never filed and never presented to the court. We submit that these purported documents are no part of the record; that the motion for dismissal, even if prepared and served, became no part of the proceedings; and that this court can give no consideration thereto. We are confident that this court can and will act only upon the legal record before the court.

A Decision on the Merits After Trial.

It seems to be the purpose of Rule 41 of the Federal Rules of Civil Procedure, and a definite tendency of all courts, to bring controversies and litigation to a definite conclusion. We take the liberty to refer briefly to decisions in two cases wherein the question at issue and the facts bear no direct analogy to the case at bar; and yet in the final result there is an analogy upon the basis that in the case at bar there has been a complete and lengthy trial with a decision on the merits. In the case of *U. S.* v. *County Commissioners,* 54 Fed. (2nd) 593, it was held that where a case had been regularly tried on evidence, it should be decided on the merits rather than dismissed without prejudice because a decree on the merits "is the purpose of litigation." Again, in *Hanna* v. *Brictson,* 62 Fed. (2nd) 139, it was held:

> "It is the duty of the courts to dispose of controversies after trial and upon their merits whenever possible. The modern tendency of both the bench and the bar is to brush aside technicalities, and to bring

about a disposition of suits, not upon some technical rule of pleading and practice incomprehensible to the lay mind, but upon the evidence and in accordance with the law."

Dismissal Without Prejudice—Another Action.

We have referred above to the question which might arise as to whether the dismissal in this case was with or without prejudice to further action. It is hardly necessary to cite authorities to establish that the general rule has been that a dismissal for want of prosecution was without prejudice, by reason of such order, to further suit on the same cause of action. In the case of *Cage* v. *Cage,* 74 Fed. (2nd) 377, the court sustained a dismissal for want of prosecution, on a regular trial call after a delay of three years and eight months, but expressly held that such dismissal did not bar a new suit; and amended the order of the District Court to affirm that it was without prejudice.

Decisions of Other Courts.

In the somewhat recent case of *U. S.* v. *Sterling,* 70 Fed. (2nd) 708, an order, denying the vacation of an order dismissing for want of prosecution, was reversed, even after the term, and the suit was required to be reinstated. The case had been dismissed on a general call under the rules of the court because of no action within a year. However, the case had been referred to a Master and fully tried, some years previously, and, indeed, had been awaiting a Master's report. The Circuit Court of Appeals held that under the circumstances it was not subject to dismissal for want of prosecution, and the United States Supreme Court denied certiorari (*Commonwealth Trust Company* v. *United States,* 293 U. S. 584, 79 L. Ed. 679).

It seems perfectly apparent, from numerous decisions, that lapse of time alone is not a conclusive reason for dismissing an action for want of prosecution. The question of whether the defendant has been in any degree prejudiced, and all of the circumstances of the particular case, must be considered to determine whether or not the trial court has acted with truly sound judicial discretion in dismissing solely for want of prosecution. As examples, we also cite:

Taylor v. *Southern Railway Company,* 6 Fed. Sup. 259.

Russell v. *Texas Transport & Terminal Company,* 32 Fed. (2nd) 689.

In a case before this court, *Dillon* v. *U. S.,* 29 Fed. (2nd) 246, it was held that an order of dismissal was not subject to be vacated after the term. Such dismissal was upon a general call, for want of prosecution, pursuant to a rule providing for dismissal where no action was taken for a year; but, with reference to such rule, this court said in concluding its opinion:

> "True, the court is not bound to dismiss under the conditions specified in the rule, but it may do so in the exercise of its sound discretion."

We think it would be entirely improper to discuss at length the decisions of the several state courts on the general question of dismissal for want of prosecution. Needless to say, they vary widely in their holdings, and sometimes because of the statutes and rules of court in the particular state. Some states have very definite statutes on the subject, and this includes California and Montana; it appears that much litigation has resulted from such statutes. We comment on these states (the Montana Code having followed the California Code) with the thought that

this case comes from Montana, and it may be possible that the judge who entered the dismissal was unconsciously influenced by his knowledge of the statutory provisions.

A study of many Montana and California decisions leads to the conclusion that even where provisions of the statute seem mandatory, they are not strictly construed, and many implied exceptions are recognized. It was so held in the recent case of *Christen* v. *Superior Court of Los Angeles County* (August, 1937), 9 Cal. (2nd) 526, 71 Pac. (2nd) 205. This case is also found in 112 A. L. R. 1153 with an extensive note on the subject matter, and we call attention to the citations, particularly at page 1169, to the effect that where an action is partially tried, it does not come within the terms of the statute. In these states the statutory provisions include the requirement that a judgment shall be entered within six months of a finding or entry of verdict, but these provisions have also been broadly interpreted.

Rule v. *Butori,* 49 Montana 342, 141 Pac. 672.
Richey Land & Cattle Company v. *Gladir,* 153 Cal. 179, 94 Pac. 768.
Neihaus v. *Morgan,* 5 Cal. U. 391, 45 Pac. 255.

In the case of *Joyce* v. *MacDonald,* 51 Montana 163, 149 Pac. 953, although eight years had elapsed with no judgment on the finding, the court held that the case should not be dismissed because all parties were entitled to some affirmative relief. So in the case at bar, the report of the Master, as confirmed, made numerous findings in favor of the defendant city as well as in favor of bondholders.

We also call attention to the case of *Marias River Syndicate* v. *Big West Oil Company,* 98 Montana 254, 38 Pac. (2nd) 599, where it was specifically held that the six months' period within which a final order must be entered under the Montana statute did not begin to run until noth-

ing more remained to be done than the mere entry of the judgment. It was there held that where the findings had not been completely and correctly adopted, then the case was still in the process of judicial determination. So in this case while a memorandum decision was filed confirming the Master's report, complete findings of fact and conclusions of law were not specifically adopted by the trial judge.

Facts and Circumstances—This Case.

We shall now ask the court to consider the nature of this case, and all pertinent circumstances as disclosed by the record. In our statement of the case, *supra,* we have reviewed briefly the pleadings and the master's report. We pointed out that upon the trial there were extended hearings and a voluminous record. The report of the Master (Rec. 43-74) was a comprehensive and detailed consideration of all issues in the case, and prompted the District Judge, who confirmed such report, to specifically comment on the painstaking efforts of the Master (Rule 88). We earnestly urge that these are considerations which should have great weight in determining whether the results should be entirely held for naught. The record which has been made by great effort of all parties should not be wasted; in equity it is for the benefit of all parties. At this time it is not a question of whether the Master was right or wrong in his conclusions, or whether Judge Pray was right or wrong in confirming the Master's report. Errors, both of findings of fact and conclusions, can be corrected at the proper time. The question now before the court is whether the entire record shall be discarded and rendered useless, with no decree upon the merits, as a result of the dismissal of the action. May we suggest briefly some of the issues in the case which seem to require that the court, sitting in equity, shall render a final decree upon the merits.

It has been repeatedly held that a court of equity takes a complete and peculiar jurisdiction in the matter of trusts, the administration thereof, and the rights, duties, and obligations of both trustee and beneficiary. We are not asking this court at this time to pass upon any of such questions in this case. Perchance, the court might eventually decide that no trust was here involved. The fact remains that upon the face of the present record, trust issues are involved.

The Master made findings and conclusions as follows:

> Monies derived from special assessments are pledged to payment of bonds, and in that sense are trust funds, whether the city is regarded as a trustee or as an agent for bondholders (Rec. 54, 65).
>
> The issue was presented whether bonds should be paid in numerical order, or in order of registration, or in prorata proportion (Rec. 55).
>
> The burden was on complainant, to include the accounting (Rec. 54-55).
>
> Records were inadequate (Rec. 60).
>
> Certain funds were tendered by the city in open court (Rec. 62).
>
> There will not be a sufficient amount collected to discharge the bonds in full (Rec. 63-66).
>
> There was no general liability of the city upon the bonds as such (Rec. 64).
>
> The duties of the city are passive, not active (Rec. 66-69).
>
> After maturity when funds are insufficient for payment of bonds in full, then all monies should be paid in pro rata proportion (Rec. 70, 72).
>
> Future action of the court, relating to administration and payment of funds, may be necessary (Rec. 72-73).

A substantial sum of money on hand and due from the city should be prorated among bondholders (Rec. 73).

Delinquent assessments and proceeds of tax sales remained to be collected and distributed subsequent to the accounting (Rec. 63, 72).

Decree Pertinent.

We submit that if the Master was wrong in such findings and conclusions against the city, then most certainly the city is entitled to a conclusive adjudication in its favor absolving it from duty and responsibility; but in equity, if the Master was correct, bondholders are entitled to their rights as beneficiaries of the trust. The entry of a proper decree is of interest to all parties.

Regardless of the amount which the Master found to be on hand (Rec. 73), the fact remains that the city did collect special assessments applicable to bonds and admitted a balance on hand which was tendered to the court (Rec. 62). Subsequently, by order of court, a part of such funds was distributed to bondholders (Rec. 85-87), and to that extent there has been a partial adjudication. The balance of such funds are, in effect, in *custodia legis;* the city has not claimed such balance, and the distribution thereof must be determined. We submit that a court would not permit a receiver to retain funds on hand, by dismissal of a Bill of Complaint without settlement from the receiver. The order for partial distribution, entered by Judge Pray without objection from the city, creates a situation which requires a final decree upon the merits.

In addition to such balance of admitted funds, perhaps commingled therewith, there may be the proceeds of delinquent assessments and tax sales which the Master found

to be uncollected (Rec. 63). The accounting herein was only brought down to a date named, and if there have been subsequent collections they would likewise be a part of the trust funds applicable to payment of bonds. The Master recommended that any such moneys should be prorated among bondholders (Rec. 72). If there be any such additional moneys at any time collected, then it is the more important that the rights of all parties therein be fixed and determined by a decree on the merits.

The issue was distinctly raised as to how bonds should be paid (Rec. 55). Not only did the Master conclude that funds should be prorated upon all outstanding bonds, but the court, by its order of partial distribution (Rec. 85), required such payment; and it was made. The order shows that the city made no objection thereto (Rec. 86), although this method was contrary to the contentions of the city. We now face a situation where payment has been made by the city pursuant to an order of court, but if the dismissal of the action is permitted to stand, such order will be void. How, then, would the balance of funds be distributed, or, perchance, what then will be the liability of the city upon the bonds? What will be the respective rights of both city and bondholders? Both are entitled to a final decree upon the merits.

Dismissal Untimely and Inequitable.

We submit that the very nature of this case, the proceedings that have been had herein, the orders entered in the course of such proceedings, all lead to but one conclusion; a final decree upon the merits is necessary and proper. A great injustice will be done to all parties if such decree be not entered. The mere dismissal of the case, under present circumstances, creates an impossible and highly inequitable situation. The order of dismissal for want of

prosecution is an anachronism; the case has been fully prosecuted and the time for dismissal is past. At the time of the order of dismissal it was in the hands of the court itself for entry of findings of fact and conclusions of law, with a decree thereon. We respectfully submit that the order of dismissal, upon the record of the case before the court, was improvident and apparently inadvertently entered without a proper understanding of the situation. Accordingly, it should be set aside so that further appropriate proceedings may be had.

Conflict of Jurisdiction Between Judges.

There is another and very cogent reason why the order of dismissal in this cause should be reversed and set aside. That order was entered by the Honorable James H. Baldwin pursuant to a rule to show cause, also entered by him. Perhaps we cannot question the technical power to act of Judge Baldwin, but we feel that his action was certainly inadvertent. The case had been pending before the Honorable Charles N. Pray, who was still a judge of the said District Court; numerous orders had been entered by Judge Pray, including a partial adjudication with distribution of money; and a memorandum decision had been filed pertaining to the merits. We think it follows, as a matter of course, that Judge Pray alone could be called upon to enter of record findings of fact and conclusions of law in accordance with Rule 70½ of the Rules in Equity, then in force, and eventually a decree.

This question of the authority of coordinate courts and judges has been the subject of many judicial comments and holdings. It will be recalled that in the earlier days of our federal courts members of the Supreme Court sometimes sat within the respective circuits to which they were assigned, and there might be in the same court a

circuit justice, a circuit judge, as well as a district judge. This difference between the judges was the basis for some question. In the case of *Appleton* v. *Smith,* 1 Fed. Cases 1075, Circuit Justice Miller, when asked to rule on a motion previously denied by a district judge, said:

> "It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to another."

Again in the case of *Cole Silver Mining Company* v. *Virginia & Gold Hill Water Company,* 6 Fed. Cases 72, Circuit Justice Field said, when asked to vacate an injunction entered by the district judge:

> "I could not with propriety reconsider his decision even if I differed from him in opinion. The circuit judge possesses, as already stated, equal authority with myself in the circuit, and it would lead to unseemly conflict if the rulings of one judge, upon a question of law, should be disregarded, or be open to review by the other judge in the same case."

Judge Brewer in the case of *Reynolds* v. *Iron Silver Mining Company,* 33 Fed. 354, made these comments:

(356) "I think that the orderly administration of justice requires, and justice itself will in the long run, and the general average be best secured, if litigation commenced before one judge continue before him until it shall be taken to an appellate tribunal."

(357) "And in conclusion it is wiser and better that the litigation commenced before one judge shall be continued, so far as practical, before him to its close in the trial court."

It seems to be the universal rule that as between courts, as such, where they are of equal jurisdiction, the one court will not disregard or overrule the other; and the reasoning which induces such a rule applies equally to judges of equal jurisdiction. In the case *Shreve* v. *Cheesman,* 69 Fed. 785, the court said in discussing the question at page 790 that it is a:

> "Principle of general jurisprudence that courts of concurrent or coordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action."

And at page 791:

> "Nor has it been thought less vital to a wise administration of justice in the federal courts that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property or of practice except for the most cogent reasons."

In the case of *Plattner Implement Company* v. *International Harvester Company,* 133 Fed. 376, the court said at page 378:

> "This rule in *Shreve* v. *Cheesman* is a rule of comity and of necessity * * * the rule itself, and a careful observance of it, are essential to the prevention of unseemly conflicts, to the speedy conclusion of litigation, and to the respectable administration of the law, especially in the national courts, where many judges are qualified to sit at the trials, and are frequently called upon to act in the same cases."

We observe that the opinion in *Shreve* v. *Cheesman* was again quoted in the case of *Boatman's Bank* v. *Fritzelen,*

135 Fed. 650, where the Circuit Court of Appeals for the Eighth Circuit reversed an order remanding a case to the state courts when another district judge had previously refused to remand the case. The court said that it was another illustration of the wisdom of the rule.

We observe with interest this definition of "comity" in a case of a somewhat different nature. We refer to the case of *U. S.* v. *Marrin,* 227 Fed. 314, where the court said:

> "It is convenient and desirable that there be a rule by which it can be determined which authority shall make way for the other. This rule is that known as the rule of comity. It answers with courts and cabinets, in law and in diplomacy, substantially the same purpose which personal courtesies serve in the social relations of life. One of the principles is that the court which first asserted jurisdiction may continue its assertion without interference from the other."

Substantially to the same effect are the following cases, to the language of which we specifically call the court's attention, but it seems unnecessary to enlarge this brief by specific discussion and quotation from each of them:

Buck v. *Steele,* 165 Fed. 577 (584).
Presidio Mining Company v. *Overton,* 261 Fed. 933 (Ninth Circuit) (Cases cited—p. 939).
Wright v. *Barnard,* 264 Fed. 585.
U. S. v. *Maresca,* 266 Fed. 713.
Commercial Union of America v. *Anglo-Smith Am. Bank,* 10 Fed. (2nd) 937.

A somewhat similar question has been before this Circuit Court in another case coming from the Montana District, and we observe that the court cited as authority some of the cases which we have referred to above. It is the case of *Hardy* v. *North Butte Mining Company,* 22 Fed. (2nd) 62, where one of the judges of the district court

of his own motion entered a rule to show cause, dismissed a bill of complaint and ordered the discharge of a receiver appointed by one of the other judges. This court said as to the sole question for decision:

> "May another judge sitting in the same court, on the same record, of his own motion or otherwise, vacate the order of appointment because, in his opinion, the order was mistakenly or improvidently made. On both principle and authority the question must be answered in the negative."

Proceedings Before Judge Pray.

As we have heretofore commented, this case was filed in the Great Falls Division addressed to the Honorable Charles N. Pray because he was there sitting (Rec. 3). From time to time at least seven different orders were entered by Judge Pray (Rec. 33, 34, 78, 82, 83, 84, 85). Exceptions to the Master's report were heard by Judge Pray. The case was taken under advisement by him upon the merits, pursuant to his order, and it will be noted that such order made a partial adjudication by requiring distribution of certain moneys (Rec. 85-87). Judge Pray made his decision upon the merits as found in his memorandum decision by which he substantially sustained the Master's report (Rec. 87-91).

The record clearly discloses that the question of a dismissal for want of prosecution was never presented to or considered by Judge Pray. It is certainly an open question, in view of the partial adjudication and the hearing upon the merits, whether Judge Pray would have entertained any such motion for dismissal. If it appeared that the case had been pending for an undue period of time, it would have been a simple matter for all parties to have been required to appear before Judge Pray.

Dismissal by Judge Baldwin Improper.

In conclusion it is respectfully submitted that under the established rule universally recognized in our federal courts, Judge Baldwin should not have assumed jurisdiction and made a final disposition of the case by an order dismissing for want of prosecution. That was an interference with the jurisdiction of Judge Pray. The question of what should be done in the matter, even if it were considered that there was an unseemly delay, was definitely a question for Judge Pray, whose province it was at the time to bring the matter to a proper conclusion. There had been a hearing upon the merits by Judge Pray, there had been a partial adjudication, there had been a decision. All of the facts and circumstances of the case, with which Judge Pray was entirely familiar, were proper to be considered in determining what action the District Court should take. If a motion to dismiss for want of prosecution was in order, such motion might be properly considered by the judge who was intimately acquainted with the proceedings. We urge that, upon the record of this case, the order of dismissal entered by the Honorable James H. Baldwin must and should be reversed.

Respectfully submitted,

Arlie M. Foor,
Robert N. Erskine,
Counsel for Appellants.

No. 9248

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Carnegie National Bank, Successor to The Hanchett Bond Company, a corporation, Appellant,

vs.

City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, Fulton County Bank of McConnelsburg, Pa., a corporation, and Dr. Louis D. Hyde, Appellees,

and

Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, Appellant,

vs.

City of Wolf Point, State of Montana, a Municipal Corporation, Carnegie National Bank, Successor to The Hanchett Bond Company, a corporation, Payne Avenue State Bank of St. Paul, Minnesota, Fulton County Bank of McConnelsburg, Pa., and Dr. Louis D. Hyde, Appellees.

Upon Appeals from the District Court of the United States, for the District of Montana.

BRIEF OF APPELLEE

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION.

FRANK M. CATLIN,
Wolf Point, Montana,
H. C. HALL,
EDW. C. ALEXANDER,
Great Falls, Montana,
Counsel for Appellee.

Filed....., 1939.

....., Clerk.

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Appellees.

Upon Appeals from the District Court of the United States, for the District of Montana.

BRIEF OF APPELLEE

CITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION.

STATEMENT OF THE CASE

The appeals herein are from orders of dismissal for want of prosecution entered by the district court on February 10th, 1939. (R. pp. 120, 121). The merits of the actions are not before the court. The issues made by the pleadings, the evidence presented are of no importance. The sole question is whether the court abused its discretion in ordering the dismissal. It is necessary, therefore, to set forth a chronological table of the events leading up to the order of dismissal. They are as follows:

1. Amended complaint filed May 22, 1930. (R. pp. 3-22).
2. Answer of City of Wolf Point, filed September 2, 1930. (R. pp. 23-33).
3. Cause referred to special master, November 17, 1930. (R. pp. 33, 34).
4. Hearing before special master completed May 8, 1931. (R. p. 45).
5. Report of special master filed November 12, 1932. (R. pp. 43-74).
6. Exceptions to master's report filed by City of Wolf Point, November 25, 1932. (R. pp. 75-78).
7. Exceptions to master's report filed by complainant and others, January 9, 1933. (R. pp. 79-82).
8. Decision of district court on exceptions to master's report, filed May 2, 1933. (R. pp. 87-91).
9. Motion to dismiss for want of prosecution, served May 14th, 1934. (R. pp. 143-145).
10. Order to show cause why action should not be dismissed, filed January 10, 1939. (R. pp. 91, 92).

11. Order of dismissal for want of prosecution, filed February 10th, 1939. (R. pp. 120, 121).

By its decision of May 2nd, 1933, on the exceptions to the master's report, the court, except as to interest payable after maturity, adopted the report "as the findings and conclusions of the court."

On the same day that the order of dismissal was entered, to-wit, February 10th, 1939, there were lodged with the clerk of court proposed findings of fact, conclusions of law and decree. (R. pp. 97-119). The record does not disclose who lodged such papers with the clerk, nor does the record show that any of them were ever submitted to either Judge Charles N. Pray or Judge James H. Baldwin, in accordance with the order entered January 21st, 1939, upon the order to show cause. (R. pp. 96, 97).

In short, the record affirmatively discloses that in spite of motion to dismiss served upon counsel for appellant on May 14th, 1934, no forward step was taken by them on behalf of appellants from May 2nd, 1933, to February 10th, 1939, a period of almost six years.

The only excuse suggested for the long delay is found in an affidavit filed by Robert N. Erskine, one of the attorneys for appellants, on January 21st, 1939. (R. pp. 92-95), wherein it is said:

> "Within a few days after the decision of the court was announced the undersigned in behalf of all bondholder parties, prepared a draft of Findings of Fact and Conclusions of Law whereby the court would adopt as its own the findings and conclusions contained in the master's report. Such instrument was

thereupon submitted to the attorneys for the City of Wolf Point with a letter commenting upon sections 70½ and 71 of the Equity Rules of the United States Court with the suggestion that it would simplify the record of said causes if the parties would stipulate that the court might so adopt the findings and conclusions of the Master's Report as constituting the findings and conclusions of the court, thereby avoiding the preparation and filing of lengthy findings of fact and conclusions of law substantially the same as contained in the Master's Report. In the answer to such suggestion the attorneys for said city declared that they preferred specific findings and conclusions.

"Thereafter there was prepared at considerable length and there was submitted to the attorneys for the City of Wolf Point as to each of the above cases (1) Findings of Fact and Conclusions of Law; and (2) a Decree. Copies of the foregoing were also submitted to Mr. Arlie M. Foor as attorney for complainants with original copies which he was requested to present to the court. The undersigned is advised that the attorneys for the city thereupon immediately made the request to Mr. Foor that the presentation of such documents to the court should be delayed until the attorneys for the city had sufficient time for a careful examination thereof. Thereafter it was suggested that there were objections to the documents so submitted, that a personal conference for the settlement of such objections seemed advisable, and that such conference might be delayed until such time as the undersigned, who was a resident and practicing attorney of Chicago, Illinois, might make a trip to Montana, in connection with certain other litigation also pending in this court."

This affidavit, however, fails to call the attention of the court to certain important matters which are entitled to consideration by the court. Thus, the first suggestion

relative to findings of fact and conclusions was made by counsel for appellants in May, 1933. Thereafter, nothing further was done by counsel for appellants until after motion to dismiss for want of prosecution had been served upon them in May, 1934. (R. pp. 143-146). No findings or conclusions were submitted until June, 1934, (R. p. 147), and it was then agreed and understood that a conference thereon should be held in July, 1934. (R. pp. 147, 149). From July, 1934, to January 21st, 1939, nothing was done about the matter, and no excuse is even suggested for such delay.

Counsel for appellant recognizes the fact, (brief p. 7) that "there is but one ultimate question before the court upon this appeal, and that is whether or not, under the facts and circumstances of this case, such order of dismissal should have been entered." They fail to recognize the rule that the "facts and circumstances" to be considered are not the allegations of the complaint and answer; the voluminous record calling for exhaustive calculations and extensive tabulations; the findings, conclusions and recommendations of the master; the exceptions to the report; or, the decision of the District Court. Rather, this court is interested in ascertaining whether the lower court abused its discretion in dismissing an action in which no forward step had been taken for six years; and, in determining whether there was any excuse, valid or otherwise, for such delay.

It stands conceded here, (brief p. 13) "that the attorneys were gravely at fault in failing to bring the matter before the court for final disposition." The

question for decision is whether that grave fault is excused by the facts and circumstances appearing in the record.

SUMMARY OF ARGUMENT

1. The sole question for determination is whether the lower court abused its discretion in dismissing the case for want of prosecution.
2. Under Rule 48-3 of the rules of the United States district court of Montana, the case was properly dismissed.
3. Under section 9317, subdivision 6 of the Revised Codes of Montana, 1935, the dismissal was proper.
4. Even after order to show cause why the action should not be dismissed, issued on January 10th, 1939, no findings of fact, conclusions of law or decree were ever submitted to Judge Pray.
5. No excuse appears in the record why decree was not entered expeditiously.
6. A litigant is entitled to have final decree entered in a cause within a reasonable time after a decision so that he may either procure a satisfaction of the decree by paying the amounts found due, or may expeditiously appeal from such decree.
7. No reason existed why Judge Baldwin could not pass upon the question of dismissal for want of prosecution since the facts necessary to his decision were uncontroverted and apparent upon the record.

I.

The Sole Question Is Whether Court Abused its Discretion.

In the opening portion of their argument, counsel for appellants concede that they "were gravely at fault in failing to bring the matter before the court for final disposition." (Brief, p. 13).

They also concede that "unquestionably, the law is that any court has inherent power, without regard even to any statute or rule of court, to dismiss any action pending therein for want of prosecution," and that "a mass of cases can be cited sustaining such power of the court with none to the contrary." (Brief, p. 12).

A dismissal for want of prosecution is within the trial court's discretion, and upon appeal from such dismissal, the only question to be determined is whether that discretion was abused.

> Carnegie Steel Co. v. Colorado Fuel & Iron Co., (C. C. A. 8th Cir.), 14 Fed. (2d) 1;
>
> Silver v. Eakins, 55 Mont. 210, 217, 175 Pac. 876;
>
> Lieb v. Lager, 9 Cal. App. (2d) 324, 49 Pac. (2d) 886.

In reaching its determination, the appellate court cannot consider the merits of the action.

> Pueblo De Taos v. Archuleta, (C. C. A. 10th Cir.), 64 Fed. (2d) 807;
>
> Superior Oil Co. v. Superior Court, (Cal.), 6 Cal. (2d) 113, 56 Pac. (2d) 950.

Contrary to the above rule, appellants contend, (brief, p. 13), "that the master's report must be considered for

the purpose of determining whether it presents a prima facie state of facts requiring a final decree thereon for the benefit of all parties."

It may be assumed that in all litigated cases a final decree is required for the benefit and protection of all parties. Appellee does not contend to the contrary. The position of the lower court, and the position of appellee herein, is that a litigant may not indefinitely delay the entry of such decree merely to suit his own convenience.

The argument that the master's report requires a decree cannot serve as an excuse for the admitted fault of appellants in not having such required decree entered expeditiously. The same specious argument now made by appellants could be made twenty years from now.

To show an abuse of discretion on the part of the lower court, appellants must here present a valid excuse for their delay of six years.

State Savings Bank v. Albertson, 39 Mont. 414, 421, 102 Pac. 692;

18 C. J. 1192.

II.

Under Rule 48-3 of the Rules of the District Court, the Case Was Properly Dismissed.

Rule 48-3 provides as follows:

"Every cause, whether criminal, at law, or in equity, in which no forward step is taken for one year, or which is not brought on for trial within one year after issue joined, may be dismissed for want of prosecution unless good cause to the contrary be shown, or the court in its discretion in criminal cases otherwise orders."

The order of dismissal was made under the above rule. (R. p. 120).

The rule is a proper one and should be enforced.

> Colorado Eastern Ry. Co. v. Union Pac. Ry. Co., 94 Fed. 312;
>
> Hall v. Maloney, 269 Mass. 228, 168 N. E. 724.

Counsel for appellants had knowledge of the rule in 1934, for it was then directly called to their attention. (R. pp. 143, 144).

Under such a rule, or without it, the duty rested upon complainant, appellant here, at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has been a gross abuse of discretion on the part of the trial court in dismissing the action for lack of prosecution its decision will not be disturbed on appeal.

> Inderbitzen v. Lane Hospital, 17 Cal. App. (2d) 103, 61 Pac. (2d) 514.

The power to dismiss extends to cases such as this, where plaintiff fails, for years, to have decree entered and the case brought to a termination.

> Svela v. Block, (Ill.), 294 Ill. App. 515, 14 N. E. (2d) 299;
>
> Peirce v. Natl. Bank of Germantown, 44 Wash. 404, 87 Pac. 488.

It may be noted that in the case of Svela v. Block, 294 Ill. App. 515, 14 N. E. (2d) 299, practically every contention here made by appellants was made by appellant there and answered by the court.

To avoid the force of the mass of decisions supporting the power of the lower court to dismiss for want of

prosecution, counsel for appellants suggest, (Brief pp. 7, 14),

(1) "on the return day of the Rule there was presented to the court findings of fact and conclusions of law and decree";

(2) "regardless of even unreasonable delay, the defendant, City of Wolf Point, has not been injured thereby."

In answer to the first of the above propositions, we point out that there is nothing in the record to show that on the Rule day or at any other time, findings of fact, conclusions of law or decree were ever presented to the court. On the contrary, the findings, conclusions and decree appear to have been merely lodged with the clerk on or after February 10th, 1939, (R. p. 115), the same day the order of dismissal was entered. (R. p. 120). Whether such papers were "lodged with the clerk" before or after the dismissal was entered does not appear.

The return day was January 21, 1939. (R. pp. 91, 92). It is apparent that no findings, conclusions or decree was entered, (Brief, p. 7), or presented, (Brief, p. 14), to the court on that day, for at that time counsel for appellants obtained and was granted "leave to *submit* proposed findings of fact and conclusions." (R. p. 96). This he failed to do.

In any event, what counsel did between January 10th and February 10th, 1939, would not excuse the previous delay of six years.

Holtzoff v. Dodge, etc., Co., 119 N. Y. S. 47.

The cases of Buck v. Felder, 208 Fed. 474, and Maison

Dorin, Societe Anonyme v. Arnold, 16 Fed. (2d) 977, have no application herein. The dismissal here was upon order to show cause issued by the court itself and not upon motion. Here there was no motion to reinstate, nor was the order of dismissal made inadvertently. It may well be doubted whether, under a rule such as 48-3, any rule or notice to proceed would be required. The rule itself, of which counsel had actual knowledge in May, 1934, would appear to be a sufficient rule and notice.

Upon the second proposition, we cannot accept counsel's ipse dixit that the City of Wolf Point has not been injured by the delay. Injury will be presumed.

> Gray v. Times Mirror Co., 11 Cal. App. 155, 104 Pac. 481.

In the above case the court said, (p. 484):

> "There is some discussion in the briefs of the proposition whether the respondent suffered any material inconvenience or hardship by the delay. The discussion is without force upon the only question which is involved here—whether the facts disclose an abuse of discretion by the trial court in the granting of the motion. We do not understand it to be necessary for the party moving to dismiss for want of diligence in prosecuting an action to affirmatively show the extent of the inconvenience or injury he has suffered, or may suffer, by reason of the delay. The law will presume injury from unreasonable delay. It is the policy of the law to favor and encourage a prompt disposition of litigation, and this policy is the outgrowth of sound and substantial reasons. The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rests upon the same reasons or principle. A party against whom an action is instituted is entitled to as speedy a disposition thereof as is consistent with his own and the rights of the plaintiff; and, if he who

starts the law in motion does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of his default."

III.

Under Section 9317, Subdivision 6, R. C. M. 1935, the Dismissal Was Proper.

On May 2nd, 1933, the district court filed its decision whereby, except as to two matters of interest, the report of the special master was "adopted as the findings and conclusions of the court." With respect to interest on funds diverted and interest after maturity, the court made specific findings and conclusions in its decision. (R. pp. 87-91).

Thereafter, all that remained to be done was the entry of a decree in accordance with such findings and conclusions.

Section 9317 of the Revised Codes of Montana, 1935, provides as follows:

"An action may be dismissed or a judgment of nonsuit entered in the following cases:

"6. By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months."

Under the above section a litigant is entitled to have an action against it dismissed where, as here, the person entitled thereto neglects to demand the entry of judgment within six months.

State ex rel. Stiefel v. District Court, 37 Mont. 298, 96 Pac. 337;

Franzman v. Davies, 32 Mont. 251, 80 Pac. 251.

Appellants cite, (brief, p. 20), the cases of

Rule v. Butori, 49 Mont. 342, 141 Pac. 672;

Joyce v. McDonald, 51 Mont. 163, 149 Pac. 953;

Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 Pac. (2d) 599,

in connection with the above statute.

In Rule v. Butori, 49 Mont. 324, 344, 141 Pac. 672, the court said: "We repeat now that, in the provision referred to, 'may' means 'must'; and, when a case presented is within this provision, the court has no power to relieve from it, or to say that it shall not be applied."

The court then points out that the statute is to be applied where there is *neglect* to apply for entry of judgment, and that it appeared that counsel did not know of the entry of findings and conclusions until four days before entry of decree. Furthermore, decree was actually entered before motion to dismiss was made.

Kasun v. Todevich, 71 Mont. 315, 229 Pac. 714.

There is no pretense here that counsel for appellants did not know of the court's decision immediately after it was entered.

In the case of Joyce v. McDonald, 51 Mont. 163, 149 Pac. 953, the court said: (p. 166):

> "Appellants invoke subdivision 6, section 6714, Revised Codes, which respondents assert cannot be applied under the decision in Rule v. Butori, 49 Mont. 342, 141 Pac. 672, because they have shown themselves guiltless of neglect. No such special conditions are presented here as were made to appear in the Butori case and we do not think the showing here made is sufficient to absolve the respondents. Indeed, we question whether any showing could be made suf-

ficient to explain or excuse the apparent indifference to the fate of this litigation on the part of every actor in it, extending over a period of approximately eight years. If the case or the position of the parties were different from what it is, we should unhesitatingly order a dismissal. But suits of this sort are sui generis; all the parties to this one sought affirmative relief, and all were found entitled to such relief, the appellants being awarded rights of the dates, if not to the extent, asserted in their answer. They were therefore no less 'entitled to judgment' than the respondents; they were equally neglectful in failing to have it entered, and they are not in position to claim the benefit of the statute."

In the present case the appellee, City of Wolf Point, neither sought, (R. p. 32), nor obtained affirmative relief against appellants.

In Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 Pac. (2d) 599, no findings of fact or conclusions of law had been made. Here they were made and adopted May 2nd, 1933.

Here exceptions were filed to the master's report, which exceptions, so far as concerned appellee, were overruled and the report adopted as the findings and conclusions of the court. There could be no further amendment or correction except upon appeal.

It is apparent that the cases cited are of no assistance to counsel here. It is hard to conceive of a case more clearly showing negligence than the present one. Indeed, counsel for appellants concede negligence in so many words. (Brief, p. 13).

While probably a Federal Court is not bound by the provisions of Section 9317 as a statute of limitations,

yet such courts may, and usually do follow the state practice and apply state statutes of limitation by analogy.

25 C. J. 850, 851;

6 Hughes Fed. Practice, sec. 3679;

Bisbee v. Evans, 17 Fed. 474;

Tice v. School District, 17 Fed. 283.

At this point, it may be well to notice the discussion appearing upon pages 16 and 17 of appellants' brief to the effect that the motion for dismissal, notice of hearing thereon, and affidavit of H. C. Hall, (R. pp. 143-146), may not be here considered. It is true that such papers were filed after the order of dismissal. So likewise was the affidavit of Arlie M. Foor, (R. pp. 121-123). In that affidavit the statement is made, "that the continuance of the said action was agreeable to all of the plaintiffs and defendants." (R. p. 122). Mr. Foor's affidavit was made a part of the record by counsel for appellants. (R. p. 142). It would appear that appellee, under such circumstances, has the right to controvert misleading statements therein by showing service upon counsel for appellants of motion to dismiss and the reason why such motion was not filed or brought on for hearing. Again, in Mr. Erskine's affidavit, (R. p. 94), appears the statement that conference by the attorneys "might be delayed until such time as the undersigned, who was a resident and practicing attorney of Chicago, Illinois, might make a trip to Montana in connection with other litigation also pending in this court." It appears important to know that such conference was to have been held in July, 1934, and not in July, 1939.

No objection was ever made to the inclusion of the papers in the record. In fact, none could have been made in view of the designation, by appellant, of Mr. Foor's affidavit.

IV.

Even After Issuance of Order to Show Cause, No Findings, Conclusions or Decree Were Submitted.

The order to show cause was issued on January 10th, 1939, (R. p. 92) and was returnable on January 21st. 1939. (R. p. 91).

Between those dates counsel for appellants did nothing. On January 21st, 1939, a so-called answer to the order to show cause was filed, (R. pp. 92-95), suggesting that "the court shall act upon and duly file and enter of record in proper form, pursuant to the rules of this court, (1) Findings of Fact and Conclusions of Law, and (2) Decrees." But no findings, conclusions or decree were then before the court, for Mr. Foor, on that date, obtained and was granted leave "to *submit* proposed findings of fact and conclusions in connection with the request therefor contained in said answer to order to show cause." (R. pp. 96, 97).

Not until February 10th, 1939, was anything done with reference to such "findings, conclusions and decree." On that date they were "lodged with the clerk of the court." (R. p. 97).

Rule 64 of the Montana District Court requires that "decrees in equity shall be signed by the Judge, and filed and entered by the clerk."

Since Judge Charles N. Pray reviewed the evidence

and the master's report, (R. pp. 87-91), it would seem that the proposed findings, conclusions and decree should have been presented and submitted to him for his signature. This, however, was never done, for in a statement made entirely outside the record, (Brief, p. 7), counsel for appellant states, "Thereafter on February 10th, 1939, the said Judge, Honorable James H. Baldwin, lodged with the clerk the said findings of fact and conclusions of law and the decree."

The situation is particularly pertinent in view of counsels' statement, (Brief, p. 25), that, "the case had been pending before the Honorable Charles N. Pray, who was still a judge of the said District Court; numerous orders had been entered by Judge Pray, including a partial adjudication with distribution of money; and a memorandum decision had been filed pertaining to the merits. We think it follows, as a matter of course, that Judge Pray alone could be called upon to enter of record findings of fact and conclusions of law in accordance with Rule 70½ of the Rules in Equity, then in force, and eventually a decree."

V.

No Excuse Appears in the Record Why Decree Was Not Entered Expeditiously.

We have searched both the record and appellant's brief in vain for any excuse, valid or otherwise, why decree was not entered within a reasonable time after May 2nd, 1933. Presumably, the search may well stop with counsel's admission "that the attorneys were gravely at

fault in failing to bring the matter before the court for final disposition." (Brief, p. 13).

In place of suggesting any excuse for this grave neglect, counsel argues, (1) That a decree on the merits, rather than a dismissal is the purpose of litigation; (2) That another action may be immediately commenced; (3) That upon the merits of the case a decree should be entered.

Such argument, which occupies a good portion of appellants' brief, (pp. 17-24), has no bearing upon the questions presented on this appeal. The court, in determining whether appellants had diligently prosecuted the case did not, and could not consider the merits. We may readily admit that the purpose of litigation is a decree upon the merits, but we also say that a speedy termination is a requirement which may and should be insisted upon. Exactly the same argument made here could be made after a delay of twenty-six years instead of six.

Cases such as United States v. County Commissioners, 54 Fed. (2d) 593, and Hanna v. Brictson, 62 Fed. (2d) 139, (brief, pp. 17, 18), have no bearing upon the question presented by this appeal. In neither case was there involved the right and duty of a court to dismiss for long and inexcusable want of prosecution.

A casual reading of newspapers, magazines and legal reviews will disclose that interminable delays in the course of litigation, while, perhaps, not entirely comprehensible to the lay mind, are fully recognized equally by laymen, lawyers and judges, as uncalled for and inexcusable. Doubtless, the failure of counsel to enter a decree

in this case for a period of six years might be incomprehensible to their clients, but they can and will readily understand the determination of the court to clear its docket of an action in which nothing has been done for that period.

It is elementary that neither the merits of the case nor the fact that another action may or may not be immediately instituted can be here considered.

> Pueblo De Taos v. Archuleta, 64 Fed. (2d) 807;
>
> Superior Oil Co. v. Superior Court, 6 Cal. (2d) 113, 56 Pac. (2d) 950;
>
> Seligman v. G. A. Scott & Bro., 17 La. App. 486; 134 So. 771;
>
> Robinson v. Sample, 242 Mich. 548, 219 N. W. 661.

The decisions cited and quoted by appellants are not contrary. (Brief, pp. 18-21).

Thus, in United States v. Sterling, 70 Fed. (2d) 708, (Commonwealth Trust Co. v. United States, 293 U. S. 584, 79 L. Ed. 679), the case was awaiting the master's report. Certainly, neither litigant could be blamed for the master's delay.

The cases of Taylor v. Southern Railway Company, 6 Fed. Sup. 259, Dillon v. United States, 29 Fed. (2d) 246, and Russell v. Texas Transport & Terminal Company, 32 Fed. (2d) 689, fully recognize and approve the rules contended for herein by appellee. What counsel for appellants overlook is that "the circumstances" to be considered by the court are the circumstances excusing the delay, not the facts and circumstances brought out

during the trial of the action or in the master's report.

In Christen v. Superior Court, 9 Cal. (2d) 526, 71 Pac. (2d) 205, the court recognized implied exceptions to the statutory requirement of dismissal where it was *not possible* to proceed.

We do not here propose to consider the pleadings, the evidence, the master's report or the judge's decision except to point out that all such proceedings took place on or prior to May 2nd, 1933. We do not concede that any interlocutory order, agreed to and acted upon, is void or voidable by reason of the dismissal. Neither, upon this appeal, do we propose to speculate as to the liability of the city upon the bonds, or what will or may be the respective rights of the city and the bondholders. Any such speculation would be fruitless, and without binding effect in another action.

> Superior Oil Co. v. Superior Court, 6 Cal. (2d) 113, 56 Pac. (2d) 950.

If the record is to be wasted that is the conceded fault of the appellants here. Further than that, we need not go.

VI.

A Litigant Is Entitled to Have Final Decree Entered Expeditiously.

In State ex rel. Stiefel v. District Court, 37 Mont. 298, 304, 96 Pac. 337, the court said:

> "If the plaintiff may, after having the default of the defendant entered, delay indefinitely to demand judgment, he may literally suspend the statute of limitations, for the statute would not commence to run until the entry of judgment. It is manifest that section 1004, subdivision 6, was enacted for the benefit of the

defeated or defaulting party, and to prevent the suspension over his head of an action which ought to be ended. The policy of the law is to put an end to litigation at the earliest practical moment."

By its proposed decree herein appellants seek to collect interest at the rate of 6% from January 1st, 1929, down to date upon the bonds, (R. p. 117), together with 6% down to date upon all funds diverted, (R. p. 112). Thus, upon the sum of $6,200.00 diverted, (R. pp. 116, 117), appellants proposed to collect $2,200.00 interest from the general taxpayers of the city for the six year period during which they neglected to enter decree. During this period there has been no decree from which the city could appeal. An easier and more pleasant method by which a litigant could be mulcted of thousands of dollars could hardly be devised.

VII.

There Was No Conflict of Jurisdiction Between Judge Baldwin and Judge Pray.

The suggestion of conflicting authority and jurisdiction betwen the two judges of the Montana District appears to be an afterthought on the part of counsel for appellants. No such theory was presented in the answer to the order to show cause filed by Mr. Erskine January 21st, 1939. (R. pp. 92-95). No such objection was made at the hearing on the order to show cause on January 21st, 1939. (R. p. 96). Since the question is not one of jurisdiction, the failure to object to the consideration of the matters by Judge Baldwin, would appear to foreclose the matter in the appellate court.

A review of the situation here presented discloses, however, no conflict of jurisdiction; no lack of comity; and, no interference with the orderly procedure of the court. No order or decision made by Judge Pray was overruled or modified. No question of fact or of law theretofore considered or decided by Judge Pray was considered or decided by Judge Baldwin. There is no conflict between the dismissal of the action for want of prosecution by Judge Baldwin and any order or decision by Judge Pray.

There is in Montana but one United States District Court. (U. S. C. A., title 28, sec. 172 as amended). Prior to 1926 there were but three divisions of the court, Great Falls, Butte and Helena. (U. S. C. A., Title 28, sec. 172). Thereafter terms were authorized to be held in other cities, including Havre, when, and if, accommodations were furnished, and provision was made for the transfer of cases to meet the convenience of parties. Under this statute the first term of court was held in Havre on May 10th, 1932, and the present case assigned to the Havre division. Judge Pray held the first term at Havre. Thereafter, down to the present time, the other Judge of the District has presided at all terms held at that place. This, by way of explanation of the issuance of the order to show cause by Judge Baldwin and his dismissal of the case.

On pages 26-29 of appellants' brief a large number of cases are cited and quoted upon the proposition that a judge may not, *on the same record,* review, modify or vacate the ruling or decision of another judge of the

same court. Most of the cases cited and quoted by appellants are found collected in the decision of this court in Hardy v. North Butte Mining Co., 22 Fed. (2d) 62. Not one of the decisions cited and quoted is based upon a situation bearing the slightest resemblance to that here presented.

Thus, in Hardy v. North Butte Mining Co., 22 Fed. (2d) 62, one judge appointed a receiver and the other judge, *on the same record,* revoked the appointment. In Appleton v. Smith, 1 Fed. Cas. 1075, a motion to dissolve an attachment was denied by one judge. Permission to review the motion *on the same grounds* was sought from and denied by the other judge. In Cole Silver Min. Co. v. Virginia & Gold Hill Water Co., 6 Fed. Cas. 72, an injunction was granted by one judge, and *the same objection* there urged was urged before the other as grounds for dissolution.

In Reynolds v. Iron Silver Mining Co., 33 Fed. 354; Plattner Implement Company v. International Harvester Co., 133 Fed. 376; Boatman's Bank v. Fritzelen, 135 Fed. 650; Presidio Mining Company v. Overton, 261 Fed. 933; Wright v. Barnard, 264 Fed. 582; and, Commercial Union of America v. Anglo-South American Bank, 10 Fed. (2d) 937, the rule was laid down that one judge of co-ordinate jurisdiction should not *review or overrule* the decisions of the other. In short, the ruling of the first judge is the law of the case upon the *same record.*

There is nothing in Birch v. Steele, 165 Fed. 577; United States v. Marrin, 227 Fed. 314; or, United States

v. Maressa, 266 Fed. 713, having any bearing upon the question.

As counsel for appellants point out in their brief, (p. 29), "the record clearly discloses that the question of a dismissal for want of prosecution *was never presented to or considered by Judge Pray.*"

Since the matter was never presented to or considered by Judge Pray, then it follows that the order of dismissal does not review or overrule any decision or order made by him.

Speculation as to what Judge Pray might or might not have done with reference to a dismissal of the case is idle. No reason existed why the rules of court could not be enforced as well by Judge Baldwin as by Judge Pray. Judge Baldwin was not called upon to either consider or pass upon the merits of the case. His order of dismissal was not based upon the same record as any of the orders by Judge Pray.

In Montana, it has been in the past, and will be in the future, the practice of the two judges of the district to sit interchangeably in the seven or eight cities designated by statute for the holding of court. In order that litigation may be disposed of expeditiously it is not only proper, but often times necessary, that different orders in the same case be made by different judges. By such action the judges do not overrule or review the decisions or orders of each other. They simply speed the lawsuit to its final conclusion. That is the situation here. No decisions or rules of law will be found condemning such a practice.

VIII.
CONCLUSION.

May we here again point out that, neither in the record nor in appellants' brief, is any excuse offered or suggested for the delay of six years in entering the final decree. We have, in appellants' brief, an elaborate discussion of the merits of the case, which may not be here considered. We also have an admission of grave neglect. How, under such a situation, can it be said that Judge Baldwin abused his discretion in making the order of dismissal?

For sometime past it has been the purpose of the Department of Justice and the United States courts to seek a speedy termination to all litigation. (American Bar Journal, December, 1938, p. 980). The dismissal here is in accord with that purpose. For six long years appellants were content to sleep upon their rights. Apparently they would have slept another six years except for the rude awakening by the order to show cause. Every argument in appellants' brief would be as appealing and as applicable twenty years from now as it is today. What the final result of counsels' neglect will be is not for this court or counsel to say upon this appeal. That will be determined at a later day.

Since no excuse for the admitted "grave neglect" is shown, and no abuse of discretion suggested, the order of dismissal should be affirmed.

Respectfully submitted,

FRANK M. CATLIN,

H. C. HALL,

EDW. C. ALEXANDER,

Attorneys for Appellee,

City of Wolf Point.

No. 9248

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARNEGIE NATIONAL BANK, SUCCESSOR TO THE HANCHETT BOND COMPANY, A CORPORATION,
Appellant,

vs.

ITY OF WOLF POINT, STATE OF MONTANA, A MUNICIPAL CORPORATION, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, A CORPORATION, HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED, FULTON COUNTY BANK OF McCONNELSBURG, PA., A CORPORATION, AND DR. LOUIS D. HYDE,
Appellees.

AND

HAZEL GRAHAM GLESSNER, AS EXECUTRIX OF THE ESTATE OF JAMES G. GLESSNER, DECEASED,
Appellant,

vs.

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UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

REPLY BRIEF FOR APPELLANTS.

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UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

REPLY BRIEF FOR APPELLANTS.

May It Please The Court:

It is a universal rule that courts of equity exercise a peculiar and all inclusive jurisdiction over trusts. We do not argue the merits when we call attention to the fact that on the face of this record a trust is involved. Complaint is made in Appellee's Brief that we have attempted to argue the merits; and it is insisted that the nature of the case and the state of the record are not facts and circumstances which are properly to be considered when the court has before it a motion to dismiss for want of prosecution.

The ultimate fact is that an order of dismissal disposes of the particular case. The court cannot and will not be blind to the effect of that dismissal. That effect depends upon the nature of the proceeding. Here there is a trust fund actually in existence, partially distributed by order of court, with the balance in *custodia legis*. The duties and obligations, as well also the rights, of the trustee are questions presented by the pleadings. That is true even though such defendant trustee has not filed a cross bill seeking affirmative relief.

The proceedings before the court were instituted by bondholders, as beneficiaries, against the City of Wolf Point as trustee, with other bondholder beneficiaries made defendant. It is not a suit by a creditor against a debtor, or by an injured party against one guilty of tort. The questions involved are not merely the liability of the city for money but a determination of its rights and duties. Those questions interest not merely the plaintiff and the defendant city; the other defendants are affirmatively interested.

It has been urged in Appellee's Brief that the defendant City of Wolf Point has asked no affirmative relief and is not interested in a decree, even though such decree be fav-

orable to such city in many respects. We insist that a trustee cannot take that position. A trustee will never be permitted to benefit by its own wrongdoing. It will no more be permitted to benefit by nonfeasance than by misfeasance. Admittedly there is a present fund of money, as well also delinquent special assessments to be collected, which are to be distributed to the beneficiaries of such funds. Those are facts and circumstances which the court cannot ignore. Counsel for appellee urge that such facts and circumstances are irrelevant and that the only fact which can be considered upon a motion to dismiss is the lapse of time. This is a proceeding in equity, and a court in the exercise of chancery jurisdiction will never ignore fundamental equities.

Preliminary to specific discussion of the points raised in Appellee's Brief, we desire to emphasize both the nature of the question before the court and how that question is presented. Should this particular case have been dismissed for want of prosecution? Courts, particularly when sitting in equity, do not invoke penalties and punishments merely to exercise jurisdictional powers. The right of the court to dismiss for want of prosecution will not be exercised without careful consideration of both the reasons for and the effect of such order.

The rule to show cause was entered January 10, 1939, on the court's own motion (Record 91). That rule was returnable and came on for hearing on January 21, 1939. The record discloses that the attorney for plaintiff was in court, presenting oral objections to dismissal; and an answer in behalf of defendant bondholders was filed (Record 92, 96). The record does not disclose that the defendant City of Wolf Point was present at such hearing or in any way participated (Record 96). Certainly, defendant city took no affirmative action.

While the record does not disclose the nature of oral objections, there is a written answer in the form of an affidavit. The reasons presented by such answer were not disputed, by countervailing affidavit or otherwise, at the hearing before the District Court. The affidavit of H. C. Hall filed almost five months later (Record 146) was not considered by the District Court and is no proper part of this record. This appeal can only be heard upon the proper record now before this court. Counsel for appellants most respectfully insist that the answer to the rule to show cause, filed in behalf of defendant bondholders, presented the reasons for the delay. When those reasons are considered in connection with the record before the District Court, they constitute a sufficient answer. Counsel for appellants accordingly urge that the rule to show cause should have been dismissed, or at the most Judge Baldwin should have required the presentation of the findings, conclusions and decree to Judge Pray.

Counsel for appellee, in his statement of the case, intertwines argument, based in part on that portion of the printed record which has no proper place therein. Such statement is clearly intended to induce the conclusion by the court that it should ignore the record except only as to the lapse of time. There is no rule of law, and no decisions have been presented or can be found, to the effect that lapse of time alone is conclusive. We shall now address ourselves to the several points presented by Appellee's Brief, taking such points in order of number, as follows:

I.

We invite consideration of the several cases cited in this part of Appellee's Brief. We are unable to discern that any of such cases bear such an analogy to the case at bar

as to make the decisions of value here. Indeed, some appear to have no real pertinency. For example, counsel for appellee declares (Brief 6): "In reaching its determination, the Appellate Court cannot consider the merits of the action", citing *Pueblo De Taos* v. *Archuleta,* 64 Fed. (2d) 807, and *Superior Oil Company* v. *Superior Court* (Cal.) 6 Cal. (2d) 113, 56 Pac. (2d) 950. Those cases are not in point on the proposition stated. So likewise the case of *State Savings Bank* v. *Albertson,* 39 Mont. 414, 102 Pac. 692, does not support the particular claim made for it. However, we invite attention to such latter case because the court there said, just as we here contend, that: "Mere lapse of time is not sufficient in itself to justify a dismissal"; and the decision further pointed out that the trial court might consider any fact as a reason for denying a motion to dismiss, including that the defendant may have acquiesced in or caused the delay.

II.

Counsel for appellee quotes rule designated 48-3 wherein it is provided that a cause may be dismissed for want of prosecution. Numerous cases cited in our original brief sustain the proposition that any such rule neither adds to nor detracts from the power of the court. If such rule now exists (since the adoption of the Rules of Civil Procedure), it is at most a warning signal, but not a mandatory requirement.

Counsel says that the rule is a proper one and should be enforced, with citation of two cases. Neither of such cases relates to the particular rule, and, indeed, the questions involved in such cases do not include a rule of similar purport. So likewise the several other cases cited by counsel in this section of Appellee's Brief do not relate either to

the rule in question or to any similar rule. All of them involve only the general proposition of the power of the court to dismiss for want of prosecution, and all of them were decided according to the particular facts involved in each case.

Counsel dismisses appellant's proposition that the City of Wolf Point has not been injured upon the basis that injury will be presumed. A California case is cited wherein the defendant had made a motion to dismiss and the court merely held that the burden did not fall on the moving party to affirmatively show injury. California decisions must be examined from the standpoint of special statutes. In the numerous cases relating to dismissal for want of prosecution, it will be found that almost invariably the moving party does allege prejudice. Generally speaking, that prejudice relates to the original trial of a case with production of witnesses. In the case at bar we have no such situation because the record has been closed as to the testimony of witnesses.

Counsel for appellant regret the necessity for correcting a misstatement, and a wrong intimation resulting therefrom, which are repeatedly made in appellee's brief. Under statement of the case (Appellee's Brief page 2) it is pointed out that the record does not disclose who filed the findings of fact, conclusions of law and decree, or that they were ever submitted to Judge Baldwin. Then the statement is found (Appellee's Brief page 9), as follows:

> "The return day was January 21, 1939 (R. pp. 91, 92). It is apparent that no findings, conclusions or decree was entered (Brief p. 7), *or presented* (Brief p. 14), to the court on that day, for at that time counsel for appellants obtained and was granted 'leave to submit proposed findings of fact and conclusions' (R. p. 96). *This he failed to do.*"

Under part IV of Appellee's Brief (page 15) it is further stated:

> "But no findings, conclusions or decree were then before the court, for Mr. Foor, on that date, obtained and was granted leave 'to submit proposed findings of fact and conclusions in connection with the request therefor contained in said answer to order to show cause' (R. pp. 96, 97).
>
> "Not until February 10th, 1939, was anything done with reference to such 'findings, conclusions and decree.' On that date they were 'lodged with the clerk of the court'" (R. p. 97).

We feel that it is clearly improper for appellee's counsel to make the statement that Mr. Foor failed to present such findings, conclusions or decree. One of the counsel for appellee was in court on January 21, 1939, and has personal knowledge of the fact that Mr. Foor tendered such findings, conclusions and decree to Judge Baldwin on that date; and as a result of such tender, in order to record the same, the memorandum order was entered granting leave to submit.

It will be noted that the case was not continued from January 21st to a date certain, but on the contrary was taken under advisement by Judge Baldwin. Thereafter, on February 10, 1939, and without notice of any kind, as appears from the record, the order of dismissal was filed and entered by Judge Baldwin. It is apparent from the record that none of the counsel representing any of the parties to the case were present before the court on such last named date.

The record of the District Court recites as follows (Record 97): "Thereafter, on February 10, 1939, *proposed* findings of fact and conclusions of law were lodged with the clerk of this court," and again (Record 115):

"Thereafter proposed decree was lodged with the clerk of this court." When the case was not on hearing on said date and no parties were before the court, we urge not only that it is the fair and reasonable interpretation, but a necessary interpretation of the record, that such findings of fact, conclusions and decree were lodged with the clerk by Judge Baldwin.

The statement that Mr. Foor failed to submit such findings, conclusions and decree, pursuant to the leave granted, has no basis in the record and is clearly erroneous. The intimations are very apparent that the appellants again failed to take any action. Such intimations are wholly unwarranted. The court is not justified in forming the conclusion, apparently desired by counsel for appellee, that such documents were not presented to Judge Baldwin. Perhaps Appellee's Brief was not written by the one of its counsel who was present before Judge Baldwin on January 21, 1939, and on that theory the misstatements and intimations are inadvertent. The ultimate fact is that the findings, conclusions and decree were tendered to Judge Baldwin in open court on January 21st, and were in his possession until by him lodged with the clerk on February 10, 1939.

III.

In this section of Appellee's Brief it is asserted that the dismissal is proper under the Montana statute. That cannot be seriously contended. Even though our federal courts, in suits at law, follow the practice of the state courts, it has been repeatedly held that in equitable proceedings federal courts follow the practice established by the Supreme Court. The case at bar was filed as a bill in equity and comes clearly within the federal practice pertaining thereto.

The District Court unquestionably had the power to act in accordance with a sound judicial discretion. That discretion should be exercised in accordance with those principles applying to federal courts of equity. State statutes are not in any sense controlling. We are not here concerned with the particular language of the Montana statutes. The reference to Montana cases, in appellant's original brief, was only directed to one point, namely, that even under such statutes there was a liberal interpretation and the language was not always construed as mandatory. Counsel for appellee attempts to distinguish, but we trust that the court will examine the cases cited.

It is urged that statutes of limitation are applied in federal courts, at least by analogy. The cases cited have no bearing on any such statute as is here invoked by appellee. Even statutes of limitation are not necessarily and always followed in courts of equity, at least the statutes of a State by a Federal Court.

In our original brief at pages 16 and 17 we pointed out that certain documents were filed in the District Court approximately five months after the dismissal, but were included in the record (Record 143-146). Appellee's Brief now endeavors to justify such filing because the attorney for plaintiff filed an affidavit after the dismissal, although before notices of appeal were given (Record 121). It will be noted that appellant has not made reference to such affidavit of Arlie M. Foor and has not relied upon anything contained therein. The appellants in this case include one of the plaintiffs and one of the defendant bondholders, and counsel represent both such parties. We endeavored to carefully refrain from putting anything into our original brief which was not predicated upon the proper record. This court has before it for review the order of dismissal entered on February 10, 1939, and it

is only the record as of that date which can properly be considered.

IV.

We have heretofore answered, under part II, this section of Appellee's Brief. In general the same subject matter is treated on pages 9 and 15 of Appellee's Brief.

Counsel does say that no action was taken between January 10th and January 21st, 1939. Believing as we do that it is improper to take any action involving a conflict of jurisdiction between judges of the same court, counsel for appellant could not at that time present the findings, conclusions and decree to Judge Pray. From the moment when the rule to show cause was issued on January 10th, that particular phase of the case was before Judge Baldwin. There would have been a distinct conflict created, if Judge Pray had then entertained a motion for the entry of a decree.

Counsel for appellee expressly recognizes that the establishment of findings of fact and conclusions of law with the entry of a decree was wholly within the jurisdiction of Judge Pray. Counsel for appellants would have been very much at fault if they had tried to start a race to determine which order should be entered first.

V.

The bald statement is made that no excuse appears why the decree was not entered. As a matter of fact the appellants responded to the rule to show cause with both written and oral presentation of the reasons for the delay. We believe those reasons fully justified upon a consideration of the entire record.

This is not the usual case of a failure to prosecute a lawsuit where the issue is yet to be determined, perhaps before a jury, upon the testimony of witnesses. On the contrary, the case has been fully tried. All parties have had every opportunity to present whatever evidence was necessary. If a trust is involved, and that is true upon the face of the record, then the city has a fiduciary relationship to the beneficiaries. Courts of equity will not permit trusts to fail or lapse. This court cannot and will not ignore those general principles relating to the jurisdiction of courts of equity in the matter of trusts.

The cases cited by counsel in this section of Appellee's Brief (page 18) again do not support the proposition as stated. In no one of such cases is it held that the court cannot or should not consider the nature of the case upon the merits or the status of the record. The case of *Superior Oil Company* v. *Superior Court,* 6 Cal. (2d) 113, 56 Pac. (2d) 950, has been cited at least three times (see pages 6, 18, 19). From a careful reading thereof we are unable to understand any connection with the case at bar.

VI.

A reading of the entire decision in *State ex rel. Stiefel* v. *District Court,* 37 Mont. 298, 96 Pac. 337, will disclose that it has no bearing on the question here at issue. Counsel for appellee quote from the case apparently in an attempt to justify the next paragraph of their brief, but the claim there made is utterly fallacious. It is said (Appellee's Brief 20) that through the delay the appellants propose to collect interest on diverted funds for the intervening period from the date of the Master's Report to the date of the decree when entered. The Master's Report specifically names the amount for which judgment should be

entered. Any attempt to increase the amount for which judgment might be entered, over and above the amount named in the Master's Report, would be a reopening of the case. Any allowance for interest as a part of the judgment is a question addressed solely to the equitable powers of the court. Appellants cannot add interest to their claim by their own act, and the charge made, that by the delay appellants are attempting to mulct the city, is wholly without justification. While interest accrues on a judgment, it is only after the entry thereof.

VII.

Counsel for appellee urge that the suggestion of conflicting authority and jurisdiction between the two judges of the District Court is an afterthought. The answer filed to the rule to show cause concluded with the insistence that there should be "entered of record in proper form, pursuant to the rules of this court (1) findings of fact and conclusions of law, and (2) decrees" (Record 95). That could only be done by Judge Pray, who had heard the case, both under general equitable procedure and under the rules, particularly Rule 70½ of Rules of Equity or Rule 52 of Rules of Civil Procedure.

The rule to show cause was pending before Judge Baldwin and the answer thereto urged certain action which could only be taken by Judge Pray. There would appear to be no other logical way to suggest to Judge Baldwin that the appropriate action was to transfer the case to Judge Pray unless the rule be discharged.

It is further insisted that the action of Judge Baldwin did not conflict in any way with the jurisdiction of Judge Pray in this case. The record shows that this case was filed to the Great Falls Division, and all orders and pro-

ceedings therein were before Judge Pray, until entry of the rule to show cause at Havre on January 10, 1939. There is nothing in this record to show that the case was ever transferred or assigned to Havre. There is no explanation in this record to indicate why Judge Baldwin, sitting at Havre, was acting in the case. Judge Pray had entered an order approving the Master's Report which made findings, conclusions, and recommendations for a decree on the merits. Such order is made abortive and is actually set aside by the order of dismissal. We submit that the exercise of judicial discretion in the matter of dismissal for want of prosecution would very aptly come within the province of the judge who had entered such order and was fully familiar with the proceedings and the nature and status of the case.

This is not a question of power or jurisdiction as such. Rather it is expressed as a rule of comity. The fact that the question of dismissal had never been presented to Judge Pray, hence that Judge Baldwin was not acting to review or overrule on that specific point, is not material. This much is true beyond dispute, that Judge Pray had announced a decision on the merits and the entry of a decree thereon was solely in his power. Any other order, or any other proceedings in the case, should have been a matter within the discretion of Judge Pray.

CONCLUSION.

This appeal is solely from an order entered by the Honorable James H. Baldwin dismissing the case for want of prosecution. We have not questioned either the power or the jurisdiction of said judge. We do submit that the entry of such order was not in accordance with the exercise of sound judicial discretion.

The case had been fully tried. The court had announced a decision substantially confirming a Master's report. The case involved a trust. There had been in part a judicial administration of that trust, a partial distribution of funds having been ordered by the Court. The defendant City of Wolf Point had a fiduciary relationship to bondholders, and the rights, as well as the duties and obligations of the city, were to be determined by the decree. It was a part of the duty of the city to bring the trust to a conclusion, and to that end it was equally the duty of the city to have entered a final decree.

By Rule 52 (a) of the present Rules of Civil Procedure (in force September 16, 1938), it is expressly provided that the adopted findings of the Master shall be the findings of the court. There was no such provision in the Rules of Equity previously existing, but Rule 70½ thereof (first adopted October 1, 1930) did require the adoption of findings of fact and conclusions of law. Counsel for appellee refused to consent to an order adopting the Master's Report as the findings and conclusions of the court; they refused to approve the extended findings and conclusions prepared by appellants' counsel; and they never offered any substitute or any definite objections (Record 92-95). Not only did appellee acquiesce in the delay in entry of a final decree but participated therein. The City of Wolf Point, holding trust funds for distribution with duties to perform, nevertheless hindered rather than expedited a termination of the matter.

We must assume that in January, 1939, the Rules of Civil Procedure governed the action of the District Court. The only rule therein relating to dismissal for want of prosecution is number 41 (b) which provides only that on motion of a defendant the cause might be dismissed, and with prejudice unless otherwise ordered. It will be noted

that the only provision in the Rules of Equity for dismissal was in Rule 57 (which was not included in the Rules of Civil Procedure), and then the dismissal was without prejudice. We do not intend to question the power of the court to protect itself and order a dismissal in a proper case. Nevertheless, we strongly urge that the very nature of Rule 41 (b) of Rules of Civil Procedure, and the failure of the United States Supreme Court to make any other provision for dismissal, makes it the more imperative that any dismissal by the court on its own motion shall be entirely free from any possible question or abuse of discretion.

We most respectfully submit that the order of dismissal in this case should be reversed and the cause remanded for further appropriate action.

Arlie M. Foor,
Robert N. Erskine,
Counsel for Appellants.

No. 9248

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Appellant,

vs.

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Appellees,

and

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Appellees.

Upon Appeals from the District Court of the United States, for the District of Montana.

PETITION FOR REHEARING

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Filed....., 1940

....., Clerk

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Appellees.

Upon Appeals from the District Court of the United States, for the District of Montana.

PETITION FOR REHEARING

Frank M. Catlin,
Wolf Point, Montana,
H. C. Hall,
Edw. C. Alexander,
Great Falls, Montana,
Counsel for Appellee.

No. 9248

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CARNEGIE NATIONAL BANK, Successor to The Hanchett Bond Company, a corporation,

Appellant,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation, PAYNE AVENUE STATE BANK of St. Paul, Minnesota, a corporation, HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased, FULTON COUNTY BANK of McConnelsburg, Pa., a corporation, and DR. LOUIS D. HYDE,

Appellees,

and

HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased,

Appellant,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation, CARNEGIE NATIONAL BANK, Successor to The Hanchett Bond Company, a corporation, PAYNE AVENUE STATE BANK of St. Paul, Minnesota, FULTON COUNTY BANK of McConnelsburg, Pa., and DR. LOUIS D. HYDE,

Appellees.

Upon Appeals from the District Court of the United States, for the District of Montana.

PETITION FOR REHEARING

1. *Rule 48-3 of the District Court has the force of law and must be complied with.*

The court holds that rule 48-3 of the District Court is not in conflict with rule 41 (b) of the Federal Rules of Civil Procedure.

In such case it "has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. The courts may rescind or repeal their rules without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which came within it, unless it is repealed by the authority which made it."

Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U. S. 603, 43 L. Ed. 1103;

Weil v. Neary, 278 U. S. 160, 73 L. Ed. 243;

Nealon v. Davis, 18 Fed. (2d) 175;

In re G. W. Giannini, Inc., 90 Fed. (2d) 445;

State ex rel Nissler v. Donlan, 32 Mont. 256, 80 Pac. 244.

Rule 48-3 provides:

"Every cause, whether criminal, at law, or in equity, in which no forward step is taken for one year . . . . may be dismissed for want of prosecution unless good cause to the contrary be shown."

The above rule applies to dismissals upon the court's own motion. Dismissals for want of prosecution on motion of a party are covered by Rule 77. (See appendix.)

No cause, good or otherwise, was shown by appellants here. The court characterizes the delay as a "period of

indifference," and states that "appellants were at fault in failing or neglecting to conclude the matter."

Appellant's brief concedes (p. 13), "that the attorneys were gravely at fault in failing to bring the matter before the court for final disposition."

Under such circumstances it became the duty of the court to enforce its rule, for the situation clearly came within its terms. Whether appellee acquiesced in the delay is of no consequence. Appellee did not make a motion to dismiss or procure the order to show cause. The order was addressed as much to appellee as to appellant. Under such circumstances, no question arises whether appellee has been injured by the delay. The sole question is whether the court was empowered under a statute or its rule to enter the order of dismissal.

State ex rel Stiefel v. Dist. Ct., 37 Mont. 298, 304, 96 Pac. 337;

Pueblo de Taos v. Archuleta, 64 Fed. (2d) 807.

The court suggests in its decision that proposed findings of fact and conclusions of law and form of decree were twice presented to counsel for appellee, City of Wolf Point, which the latter declined to accept. But the last of these were presented in 1934 (R. p. 147), approximately five (5) years before the order of dismissal.

The decision further states that "appellees have not been injured by the delay in entering a decree; the City at no time made an effort to pay *its* indebtedness or even collect the assessments and it was in no worse position at the end than at the beginning of the period of indifference." (Decision, p. 7.)

The rule (48-3) does not require that the appellee show injury, and such a requirement should not be read into the rule.

The indebtedness is *not* an indebtedness of the City (save as to diverted funds), but solely of the special improvement district.

> State ex rel Griffith v. Shelby, 107 Mont. 571, 87 Pac. (2d) 183, 195.

There is nothing in the record before this court to show the City has not collected all assessments which were collectible prior to tax deed to the county. After that the assessments upon such property were uncollectible.

> State ex rel Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638;
>
> Stanley v. Jeffries, 86 Mont. 114, 284 Pac. 134.

Further, appellants seek by the decree lodged with the clerk to recover 6% interest on diverted funds. Thus, upon the sum of $6,200.00 claimed to have been diverted (R. pp. 116, 117), appellants propose to collect $2,200.00 interest. During this period there has been no decree from which the City could appeal to the Circuit Court. The statute of limitations has been suspended indefinitely. Such a situation should appeal to the discretion of any court.

> State ex rel Stiefel v. Dist. Court, 37 Mont. 304, 96 Pac. 337.

2. Action of Judge Baldwin.

In its decision the court says:

(a) "No reason is to be found in the record why Judge Baldwin entered the order to show cause in a case with which he was obviously unfamiliar."

(b) "The order appealed from renders ineffectual the decision of a judge of equal rank, to whom the cause was originally submitted, by another judge who *injected himself into the case on his own initiative.*"

As pointed out in the original brief of appellee, no objection was made by appellant to the hearing of the order to show cause by Judge Baldwin at Havre. Had there been such an objection, doubtless the reasons for the transfer of the case to Havre and for the presence of Judge Baldwin there would have been made to appear, if that was necessary.

There is always a presumption of regularity with reference to the proceedings of a judicial tribunal.

22 C. J. 128, sec. 68.

The only local defendant was the City of Wolf Point, some 125 miles nearer Havre than Great Falls. When terms of court were authorized at Havre, the cause was transferred to that point automatically. (U. S. C. A. Title 28, sec. 172 as amended; District Court rule 9-2, 3.) By agreement of the District Judges of Montana, Judge Bourquin, or his successor, Judge Baldwin, have, since 1932, assumed jurisdiction over all cases assigned to Havre. (Title 28, U. S. C. A., sec. 27.) The record does not show these facts because there is no record of it. But, under the circumstances, it seems rather harsh to state unequivocally that Judge Baldwin "injected himself into the case on his own initiative." He entered the order to show cause and the order of dismissal because, under the rule of the court and the statute, the case was on his Havre calendar for disposition.

Judge Baldwin found that no step had been taken in the cause since 1933. Under rule 48-3 it was subject to dismissal without order to show cause and without notice.

Nealon v. Davis, 18 Fed. (2d) 175:
Cage v. Cage, 74 Fed. (2d) 377;
Dillon v. United States, (9th Cir.) 29 Fed. (2d) 246.

However, he issued an order to show cause directed to all parties. At the time for hearing the order, no objection was made to Judge Baldwin proceeding in the matter.

Appellants contented themselves with the filing of an answer (R. pp. 92-95), which was submitted to Judge Baldwin (R. pp. 95-97), all without objection to his acting in the matter.

The answer obviously failed to show cause why no step had been taken in the action for six years. This is conceded by appellants.

Where no objection is made, and the appellant was willing to submit its case to Judge Baldwin, it may not now complain of an adverse decision by him. The right to hear the order to show cause conceded the right to decide, and appellants may not concede the one without the other, and merely object after the adverse decision.

There is here no question of the jurisdiction of Judge Baldwin. The question is whether he had authority to hear and determine. In such case, where no objection is made in the lower court with respect to such authority, the matter may not be raised for the first time on appeal.

4 C. J. S. pp. 509-511.

Here, as shown by the record, appellants were perfectly willing to submit the question of dismissal to Judge Baldwin. They were not willing that he decide against them. It is elementary that a litigant may not sit by without objection and speculate on the result of certain proceedings, and when that result is unfavorable, for the first time object.

Hanley v. Great Northern R. Co., 66 Mont. 267, 213 Pac. 235.

In the case of Ex parte Kamiyama, 44 Fed. (2d) 503, this court said:

> "It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court (citing cases), and, where a party has an opportunity to make an objection to a ruling adverse to him and does not do so, he cannot urge the objection on appeal."

Upon the question of a dismissal under rule 48-3, Judge Baldwin did not consider the merits of the case. The merits were not before him. He merely considered the applicability of rule 48-3, which had the effect of a statute, and the provisions of which could not be dispensed with "simply to meet what is supposed to be the exigencies of a particular case."

Nealon v. Davies, 18 Fed. (2d) 175.

While the net result of the dismissal is to render ineffectual the decision of Judge Pray on the merits, nevertheless the dismissal had nothing to do with the merits, and did not pretend to review, set aside, or disregard such decision.

Hardy v. North Butte M. Co., 22 Fed. (2d) 62.

3. Dismissal on the merits.

While appellee does not consider that a dismissal under rule 48-3 is with prejudice, nevertheless, appellee hereby consents that the order of dismissal be modified to state that the dismissal is without prejudice.

Cage v. Cage, 74 Fed. (2d) 377;

Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 612, 37 L. Ed. 577.

Respectfully submitted,

Frank M. Catlin,

H. C. Hall,

Edw. C. Alexander,

Attorneys for Appellee.

CERTIFICATE

United States of America,
District and State of Montana, } ss.
County of Cascade.

I, H. C. Hall, one of the attorneys for the above named appellee, do hereby certify that in my judgment the above and foregoing petition for rehearing is well founded, and such petition for rehearing is not interposed for delay.

H. C. Hall

.....

APPENDIX

Rule 9-2. Causes, civil and criminal, may be transferred by the Court or a Judge thereof from any sitting place designated herein to any other sitting place thus designated, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the Court or Judge thereof in either place.

CHARLES N. PRAY,
Judge.

Rule 9-3. All causes shall be assigned to that division of the District wherein they properly belong by conformity as near as may be to the laws of the State of Montana governing the place of trial in the courts thereof, and the trial of all issues shall be at the place where court is held within the division to which the cause is so assigned, unless by agreement of the parties with the consent of the Court or by order of the Court in its discretion or for good cause shown, such trial is ordered elsewhere. The plaintiff shall endorse on the complaint or bill the division wherein the cause is assignable.

Rule 77. *Dismissal for Want of Prosecution*—Dismissals for want of prosecution may be had as follows:

Sub. 1. Whenever the plaintiff in an action at law shall fail for one year from the filing of the complaint to have summons issued against any defendant who has not appeared in the action, or shall fail to make a bona fide effort to procure the service of summons within ninety days after its issuance, upon any defendant who has not appeared in the action, or whenever the summons shall not have been served and return made within three years from the commencement of the action upon any defendant who has not appeared therein, such defendant may on motion after notice, and special appearance for the purpose, have said action dismissed as to him.

Sub. 2. Whenever the complainant in a bill in equity shall fail to have a subpoena issued on such bill within one year after the filing of the bill, or shall fail to make a bona fide effort to procure a service of the subpoena, within ninety days after its issuance, upon any defendant who has not appeared in the cause, or whenever the subpoena shall not have been served within three years from the commencement of the suit, upon any defendant who has not appeared therein, such defendant may on motion after notice, and special appearance for the purpose, have said suit dismissed as to him.

Sub. 3. Whenever the plaintiff in an action at law or the complainant in a suit in equity shall neglect to bring the action on for trial or hearing for an unreasonable time after issue joined, and defendant may, on motion after notice, have the action or suit dismissed as to him; provided, that except in actions for partition, or to recover the possession of, or to enforce a lien upon, or to determine conflicting claims to, real or personal property, no dismissal shall be had under this rule as to any defendant because of the failure to serve process on him during his absence from the district, or while he has secreted himself within the district to prevent the service of summons on him; and that no action or suit shall be dismissed for failure to bring the same on for trial or hearing, if such failure was caused by the defendant who makes the motion to dismiss.

Sub. 4. Whenever a cause shall remain unanswered on three consecutive calls of the General Trial Calendar, as provided in Rule 48, the same shall be dismissed for want of prosecution.

No. 9243

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN T. WATSON, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico,

Appellant,

vs.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, a corporation, H. B. HERSHEY, Receiver of Mississippi Valley Life Insurance Company, R. E. O'MALLEY and WILLIAM E. CAULFIELD, Receivers, J. G. VAUGHAN, M. J. DOUGHERTY, GRACE V. ROWELL formerly Grace V. Wallace, WILLIAM H. WALLACE, a minor, ANNA LOUISE WALLACE, a minor, R. L. DANIEL, Chairman of the Board of the Insurance Commission of the State of Texas,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

PARKER PRINTING COMPANY 545 SANSOME STREET SAN FRANCISCO

NO. 9243

United States

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JOHN T. WATSON, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico,

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Appellees.

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Upon Appeal from the District Court of the United States for the District of Arizona.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Arizona

No. E-361-Phx

JOHN T. WATSON,

Orator,

v.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS,

H. B. HERSHEY, Receiver of Mississippi Valley Life Insurance Company, and R. E. O'Malley and William Caulfield—Missouri Receivers,

J. G. VAUGHAN, and
M. J. DOUGHERTY and O. E. PATTERSON,

Defendants.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

PETITION FOR LEAVE TO SUE

To the Honorable Dave W. Ling, Judge of Said Court:

Comes now John T. Watson, and respectfully shows to the Court:

1. That he is a citizen and resident of the City and County of Santa Fe, State of New Mexico, and he has been appointed by the Honorable Judge of the District Court of the First Judicial District of the State of New Mexico, in Cause numbered 14867 on the docket of said court, wherein Richard C. Dillon, for himself and other similarly situated, brought a suit against the Superintendent of Insurance of the State of New Mexico, Joseph B. Thompson and William B. Caulfield, Receivers of Mississippi Valley Life Insurance Company, a corporation, appointed by the Circuit Court of the City of St. Louis, Missouri, H. B. Hershey (substituted for Alvin S. Keys) Receiver of said Mississippi Valley Life Insurance Company under order of the Circuit Court of Sangamon County, Illinois, and Republic Life Insurance Company of Dallas, Texas, a corporation, for the purpose of liquidating the assets pledged with the Insurance Department of the State of New Mexico, to secure the policies that had been registered with the Insurance Department of the State of New Mexico, having been issued by the National Life Insurance Company of the Southwest. [4]

2. That the National Life Insurance Company of the Southwest did transfer and assign all of its business, together with the securities on deposit with the Insurance Department, to the Two Republics Life Insurance Company of El Paso, which maintained said deposits, securing all the old policies issued by the National Life Insurance Company of the Southwest, and thereafter, the Two Republics Life Insurance Company transferred and assigned all of its business and assets to the Mississippi Valley Life Insurance Company, a corporation of Illinois, and they in turn recognized and maintained the same securities, or some substituted therefor, among which was a lien given by James Q. Wallace for the principal sum of $32,000.00, upon the hereinafter described property, situated in Maricopa County, Arizona, to-wit:

> The Southeast ¼ of Section Nineteen, Township One North, Range Six East, of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona.

3. That all of said assets were deposited with the Insurance Department of the State of New Mexico, under and by virtue of what is now known as Section 71-155 of the New Mexico Statutes Annotated, 1929, which reads as follows:

> "71-155. Registered Policies. When any policies have heretofore been registered with the insurance department of the state of New Mexico, or with the office of the bank examiner under the conditions of section 38, chapter 48

(Rep.), of the session laws of the year 1909, it shall be the duty of the superintendent to maintain a register of such policies in a form that will enable him to compute the net value of such policies at any time, and it shall be the duty of each company having any such registered [5] policies in force to semi-annually supply the superintendent with a certified list of the net value of all such registered policies in force as at that date, and to at all times maintain approved securities of one of the kinds authorized as an investment for any insurance company with the corporation commission of an amount equal to the said net value, and whenever it be shown that the amount of said securities so on deposit is in excess of the net value of the registered policies of such company the amount of such excess shall be immediately released and delivered to the company; Provided, that in computing the net value of any policies so registered credit shall be allowed on each policy for the amount of any outstanding policy, loan or lien secured exclusively by the cash or loan values of said policy. (L. '25, Ch. 135, Sec. 55."

4. That there was no provision in the insurance law of New Mexico which gave to the Insurance Department of the State of New Mexico the right to liquidate the escrowed or pledged securities or assets, in case of a default or insolvency of the in-

surance company, and the Mississippi Valley Life Insurance Company was declared insolvent on the .....day of April, 1932, in cause numbered 56734 in the Circuit Court for the County of Sangamon, State of Illinois, in cause entitled People of the State of Illinois ex rel, Leo H. Lowe, Director of Trade and Commerce of the State of Illinois, as Plaintiff, versus Mississippi Valley Life Insurance Company, and Alvin S. Keys was appointed Receiver therefor.

5. That on the 18th day of May, 1932, the Republic Life Insurance Company of Dallas, Texas, acting by and through E. H. Banta, its Vice-President, made a contract with the Receivers of the Mississippi Valley Life Insurance Company, whereby the Republic Life Insurance Company of Dallas, Texas, [6] took over the policies that had formerly been written by the Two Republics Life Insurance Company, which included the registered policies previously written by the National Life Insurance Company of the Southwest, and making a contract, a copy of which is hereto attached and made a part hereof, marked "Exhibit A," paragraph three of which provided:

> "On all policies which are secured by deposit with the Insurance Department of the State of New Mexico, the party of the first part shall be entitled to receive from said Insurance Department of the State of New Mexico, securities now on deposit to the value of the reserve of the policies on which said

party of the first part assumes liability hereunder and the policy holders accept such assumption, and said party of the first part shall, with the consent of the Insurance Department of the State of New Mexico, be entitled to have said reserves credited to it in such manner as the Insurance Department of the State of New Mexico shall approve, and said Alvin S. Keys, Receiver, shall be entitled to the reserves on deposit with the said Insurance Department of the State of New Mexico, in excess of the claims which are against the said deposits. The lien on any such policy shall be reduced by the amount credited to, or received by, said party of the first part from said deposit with said insurance Department of the State of New Mexico on account thereof."

And at that time were furnished a list of securities on deposit with the Insurance Department of the State of New Mexico, as of date May 16, 1932, copy of which is attached hereto, marked "Exhibit B."

6. That the said land was transferred to the Mississippi Valley Life Insurance Company, but although the legal title then rested in the Mississippi Valley Life Insurance [7] Company, they at all times recognized that the equitable title to the lien thereon was in the Insurance Department of the State of New Mexico.

7. That after making the said contract, the said E. H. Banta brought a pretended suit in the Su-

perior Court of the State of Arizona in and for Maricopa County, entitled, E. H. Banta, Plaintiff, versus A. O. Pelsue, as Receiver of the Mississippi Valley Life Insurance Company, numbered 37799 on the docket of said court, and received a decree of said court on August 22, 1932, that he was the owner in fee simple of the above described land, but a finding of the Court in said decree recognized the escrow contracts of purchase and sale of said land being with the State of New Mexico.

8. That neither said E. H. Banta nor Republic Life Insurance Company of Dallas, Texas, received any transfer of either said land or the lien thereon from the Mississippi Valley Life Insurance Company of Illinois, or anyone acting under and by virtue of any authority for them, but acting with an evident design to take the property for the Republic Life Insurance Company of Dallas, Texas, did transfer the property to J. G. Vaughan, who, plaintiff is informed and believes, transferred said property back to Republic Life Insurance Company of Dallas, Texas, fraudulently intending thereby to prevent the said property being used in liquidation to pay the said registered policy holders.

9. That all contracts between all of the parties recognized the right of the Insurance Department of the State of New Mexico to said security.

10. That the Commissioner of Insurance of the State of New Mexico is not given by any Statute any authority to liquidate the said assets, and he has made an assignment to your petitioner of all

of said assets, and especially the Wallace lien and property, for the purpose of liquidation, and for the purpose of payment of all the registered policy holders aforesaid, through the District Court in said above [8] entitled cause, pending in Santa Fe, New Mexico.

11. That David Chavez, Jr., Judge of said court, finding that it was necessary to liquidate the Wallace property, being described as:

> The Southeast ¼ of Section Nineteen, Township One North, Range Six East of the Gila and Salt River Base and Meridian, in Maricopa County, Arizona,

to pay the claims of said registered policy holders, entered an order authorizing your petitioner to establish the lien, rights, interest or title in or to said property, in his name as Receiver, for the benefit of the policy holders and claimants under said statute, a certified copy of which order is hereto attached and made a part hereof, marked "Exhibit C."

12. That there are no Arizona creditors that can have any claim against said property unless they are holders of registered policies issued by the National Life Insurance Company of the Southwest, and as to them, they have, along with all other registered policy holders, an equal right of participation in the liquidation for which said assets were escrowed.

13. That if he is not allowed to bring this suit, he fears irreparable injury will result, in that the

defendant will transfer said property to innocent purchasers, for value, and said property will be lost to the policy holders.

14. That the Republic Life Insurance Company of Dallas, Texas, is claiming to own said property, as it lists as part of its assets with the Insurance Department of the State of Texas, the above described property, as shown by copy of a letter hereto attached and made a part hereof, marked "Exhibit D."

Wherefore, your Petitioner asks leave to file the suit in this court against Republic Life Insurance Company of Dallas, Texas, H. B. Hershey, Receiver of the Mississippi Valley Life Insurance Company, J. G. Vaughan, and M. J. Dougherty, to the end that justice may be done, and that the property be [9] recovered for the benefit of the registered policy holders of the National Life Insurance Company of the Southwest, upon such terms and conditions as to the Court may seem just and right.

Post Office Address:
Sena Plaza, Santa Fe,
New Mexico;

Post Office Address:
415 Caples Bldg.,
El Paso, Texas,
Attorneys for Petitioner.

State of New Mexico,
County of Santa Fe—ss.

John T. Watson, being first duly sworn, upon his oath deposes and says: That he is over the age of twenty-one, is the Petitioner in the foregoing Petition for Leave to Sue; that he has read the same, and the matters and things therein stated are true, except those things stated upon information and belief, and these he believes to be true, and so states.

.....

Subscribed and Sworn to, before me, this..... day of March, A. D. 1937.

.....

Notary Public in and for the County of Santa Fe, State of New Mexico.

My commission expires: ..... [10]

EXHIBIT A.

AGREEMENT BETWEEN REPUBLIC LIFE INSURANCE COMPANY AND RECEIVERS OF THE MISSISSIPPI VALLEY LIFE INSURANCE COMPANY.

This Agreement, made and entered into this 18th day of May, 1932, by and between Republic Life Insurance Company of Dallas, Texas, party of the first part, and Joseph B. Thompson and William E. Caulfield, Receivers of the Mississippi Valley Life Insurance Company, a corporation, appointed

by the Circuit Court of the City of St. Louis, Missouri, and Alvin S. Keys, Receiver of the said Mississippi Valley Life Insurance Company, under authority of the Circuit Court of Sangamon County, Illinois, parties of the second part, Witnesseth:

1. Party of the first part agrees to assume as herein set out liability to insured and/or beneficiary on all policies known as ordinary life policies from and after noon central standard time May 16, 1932, issued by the Two Republics Life Insurance Company or National Life Insurance Company of the Southwest, and assumed by said Mississippi Valley Life Insurance Company, on which there are at said time no claims by death or disability and on which there is no default in premium prior to April 1, 1932, and on all ordinary life policies issued by said Mississippi Valley Life Insurance Company direct on which there are at said time no claims by death or disability and on which there is no default in premium prior to April 1, 1932.

2. Party of the first part shall be subrogated to the claims under all policies against the estate of Mississippi Valley Life Insurance Company on which the policy holders accept this assumption of insurance and may file a claim therefor in the receivership in the Circuit Court of Sangamon County, Illinois, transferred from the Circuit Court of Madison County, Illinois, and in the Circuit Court of the City of St. Louis, Missouri, and shall apply any sums received under such claims to the

benefit of any such policy holder in the form of reduction of the amount of lien hereinafter provided for against such policies. [11]

3. As part of the consideration for this contract there shall be established and placed against each policy on which liability is assumed hereunder by party of the first part, a lien equal to 100% of the legal reserve thereon on the basis established and carried on the books and records of said Mississippi Valley Life Insurance Company, on the date to which premium has been paid to said Mississippi Valley Life Insurance Company, plus mortality rate from May 16, 1932, to date such premium is paid, such lien to bear interest at the rate of 6% per annum compounded annually. Both lien and interest thereon shall be treated as a policy loan and shall be deducted from any payment made by party of the first part and from any settlement thereunder or from the value used to purchase any paid-up or continued insurance.

On all policies which are secured by deposit with the Insurance Department of the State of New Mexico, the party of the first part shall be entitled to receive from said Insurance Department of the State of New Mexico, securities now on deposit to the value of the reserve of the policies on which said party of the first part assumes liability hereunder and the policy holders accept such assumption, and said party of the first part shall, with the consent of the Insurance Department of the State of New Mexico, be entitled to have said reserves

credited to it in such manner as the Insurance Department of the State of New Mexico shall approve, and said Alvin S. Keys, Receiver, shall be entitled to the reserves on deposit with the said Insurance Department of the State of New Mexico, in excess of the claims which are against the said deposits. The lien on any such policy shall be reduced by the amount credited to, or received by, said party of the first part from said deposit with said Insurance Department of the State of New Mexico on account thereof. [12]

4. Party of the first part agrees that it will offer to the holder of any such policy term insurance at net cost to the extent of such lien so that each such policy holder may by carrying term insurance make available the full face of said policy in case of death.

5. The reinsurance and assumption of obligations herein provided for are further subject to the conditions, limitations and agreement that for a period of five years from the date as of which this contract becomes effective cash loans, except that part of the loan value that is applied to the payment of premiums on the policy on which the loan is made, and cash surrender values, shall not be available to such policy holders.

6. Party of the first part assumes no liability of any nature, or any claim on the policies herein reinsured, which shall originate prior to noon, Central standard time, May 16, 1932.

7. Said Jos. B. Thompson and William E. Caulfield, Receivers, parties of the second part agree to transfer and deliver to said party of the first part all cards, files, records and cabinets containing same pertaining to said policies, and mechanical equipment necessary for the keeping thereof, now in St. Louis, Missouri, as designated heretofore by list given said Thompson and Caulfield, Receivers, and said party of the first part agrees to pay said Thompson and Caulfield, Receivers, a sum to be fixed by the Circuit Court of the City of St. Louis, as the value thereof.

8. The holder of any such policies not defaulted for non-payment of premium may within one year after said default, subject to lien of proper amount of reserve, upon evidence satisfactory to said party of the first part, of the health and insurability of the insured have said party of the first part assume liability on such policy from the date of reinstatement forward, provided on policies where default is not prior to April 1, 1932, insurance will attach from May 16, 1932, at noon, central standard time, to be void unless premium [13] be paid on or before June 15, 1932.

9. Party of the first part hereby constitutes the Superintendent of Insurance of the State of Missouri, its attorney in fact for it and in its name to accept service of process in any court in the State of Missouri, on account of any policy wherein the insured is now a resident of the State of Missouri, and constitutes the Director of Trade and

Commerce of the State of Illinois its attorney in fact for it and in its name to accept service of process in any court in the State of Illinois on account of any policy wherein the insured is now a resident of the State of Illinois.

10. Party of the first part on or before August 31, 1932, agrees to furnish to parties of the second part a computation of the reserve on each policy on which it assumes liability hereunder as of April 25, 1932, plus the proportionate part of any unexpired premium in order to furnish the amount of the claim under each policy and to furnish a separate computation with the same information on all policies for which it receives the cards, the holders of which do not accept or receive insurance under the terms hereof.

11. Said parties of the second part shall at all reasonable times have access to any records received by party of the first part for any purpose necessary in the administration of said receiverships.

In Witness Whereof, said parties have executed these presents the year first above mentioned.

REPUBLIC LIFE INSURANCE COMPANY

By.....

Vice-President.

Attest:

.....

Secretary.

.....

Receivers, Mississippi Valley Life Insurance Company, Circuit Court, City of St. Louis, Missouri.

.....

Receiver, Mississippi Valley Life Insurance Company, Circuit Court of Sangamon County, Illinois, by transfer from Circuit Court of Madison County, Illinois. [14]

EXHIBIT B.

SECURITIES ON DEPOSIT WITH THE INSURANCE DEPARTMENT * STATE OF NEW MEXICO AS A GUARANTEE TO NATIONAL LIFE OF THE SOUTHWEST POLICIES.

May 16, 1932

Number	Name	Amt of Lien	Rate of Int.
40 CS	Jas. Q. Wallace	$32,000.00	6
56 T	Jno. B. Milbourn	600.00	8
94 T	Julia A. Valdespino	7,000.00	6
96 T	R. T. Lewis	2,500.00	8
102 T	Yandell Realty Co.	12,000.00	6
103 T	Jas. Rehin	5,000.00	7
235 M	Stella Grady	4,200.00	6
39 CS	John R. Wallace	26,311.35	
		$89,611.35	

[15]

EXHIBIT C.

State of New Mexico
County of Santa Fe

In the District Court

Richard C. Dillon for Himself and Others Similarly Situated,

Plaintiff,

vs.

George M. Biel, (Substituted for Max Fernandez), Superintendent of Insurance of the State of New Mexico; Joseph B. Thompson and William B. Caulfield, Receivers of Mississippi Valley Life Insurance Company, a Corporation, Appointed by the Circuit Court of the City of St. Louis, Missouri; H. B. Hershey (substituted for Alvin S. Keys) Receiver of Said Mississippi Valley Life Insurance Company Under Order of the Circuit Court of Sangamon County, Illinois; and Republic Life Insurance Company of Dallas, Texas, a Corporation,

Defendants.

ORDER

The Court having been advised by John T. Watson, Referee and Receiver herein, that the services of Fred C. Knollenberg, Attorney at Law, have been secured in accordance with the order entered

herein on February 2nd, 1937, and as evidenced by the memorandum agreement filed herein; and it appearing to the Court that the assets now in the hands of the Receiver are insufficient to pay all claims now filed or to be filed herein; and it further appearing that it is to the best interests of the policy-holders and claimants in this Receivership to immediately file suit against the present claimants and holders of the tract of land known as the Wallace property and more fully described in the Report of John T. Watson Receiver at item seven, said property being described as the Southeast Quarter, Section 19, Township 1 North, Range 6 East of the Gila and Salt River Base and Meridian of Maricopa County, Arizona.

It Is Therefore Ordered and Decreed that John T. Watson Receiver herein forthwith proceed with suit in the [16] Arizona State or Federal courts after first having obtained and received permission from said Court to bring action to establish the lien, rights, interest or title in and to said property in his name as Receiver for the benefit of the policyholders and claimants herein.

(Signed) DAVID CHAVEZ, JR.

District Judge. [17]

EXHIBIT D.

R. L. Daniel,
Chairman of the Board and Life Insurance Commissioner.
(Printed seal): The State of Texas
Geo. Van Fleet
Actuary of the Board
State of Texas
Board of Insurance Commissioners
Life Division
Austin
March 12, 1937
Mr. Fred C. Knollenberg, Attorney
El Paso, Texas

Dear Sir:

The sworn annual statement filed with this Department as of December 31, 1936, by the Republic Life Insurance Company of Dallas, Texas, lists as part of its assets the following:

155 acres, So. E. qt. Sec. 19, Township 1, Maricopa Co., Arrizona, & Buildings

80 acres, No. E. qt. Sec. 19, Maricopa Co., Arizona, & Bldgs.

Very truly yours,
(Signed) GEO. VAN FLEET,
Actuary Board of Insurance Commissioners.

GVF.mb

[Endorsed]: Filed Mar. 22, 1937. [18]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, H. B. HERSHEY, RECEIVER OF MISSISSIPPI VALLEY LIFE INSURANCE COMPANY.

Comes now H. B. Hershey, Receiver of Mississippi Valley Life Insurance Company (under appointment by the Circuit Court of Sangamon County, Illinois), one of the defendants in the above entitled cause, by Charles E. Bliss, his attorney, and for answer to the bill of complaint filed herein says:

1. That he admits the allegations of Paragraph I invoking the jurisdiction of this court and the residence of this defendant, but as to the other matters and things therein alleged he has no knowledge or information upon which to form a belief and prays for strict proof of same.

2. That this defendant has no knowledge or information upon which to form a belief as to the matters and things stated and alleged in Paragraphs II, III, IV, V, and VI. [26]

3. That from the records of said Mississippi Valley Life Insurance Company coming into the hands of this defendant as Receiver thereof, he verily believes the matters and things alleged in Paragraphs VII, VIII, IX, X, XI, XII, XIII, XIV, and XV of the complaint to be true and correct, and they are hereby admitted.

4. That he admits, as alleged in Paragraph XVI, the execution on May 18, 1932, of the con-

tract, copy of which is attached to the bill of complaint and marked Exhibit "K", with the defendant Republic Life Insurance Company of Dallas, Texas, in accordance with the order of the court dated May 18, 1932, in and by which said agreement said defendant agreed to assume the policy obligations of said Mississippi Valley Life Insurance Company, including the aforesaid registered policies issued by the National Life Insurance Company of the Southwest, but charging against each policy so assumed a lien in the amount of the whole legal reserve thereon, and avers that said contract did not purport to or as a matter of law did not affect or contemplate transfer of title to the property described in the bill of complaint, and further avers that said contract did not affect the rights and lien of the Superintendent of Insurance of the State of New Mexico but was intended to be a contract of reinsurance only in accordance with the tenor and effect thereof, as this defendant verily believes from the records.

5. That this defendant has no knowledge or information upon which to form a belief as to the matters and things alleged in Paragraph XVII of the bill of complaint and prays for strict proof of same.

6. That from the records of said Mississippi Valley Life Insurance Company coming into the hands of this defendant as Receiver thereof, he verily believes the matters and things alleged in

Paragraph XVIII of the complaint to be true and correct, and they are hereby admitted. [27]

7. That he has no knowledge or information upon which to form a belief as to the matters and things alleged in Paragraphs XIX, XX, XXI, XXII, XXIII, XXIV and XXV of the complaint and prays for strict proof of same.

H. B. HERSHEY
Receiver of Mississippi Valley Life Insurance Company (Under Appointment by the Circuit Court of Sangamon County, Illinois).

CHARLES E. BLISS,
Rambach Building
Taylorville, Ill.
Attorney for H. B. Hershey. [28]

State of Illinois
Christian County—ss.

H. B. Hershey, being first duly sworn, on oath deposes and says:

That he is the duly acting and qualified Receiver of the Mississippi Valley Life Insurance Company, appointed for the purpose of liquidating the assets of the company for the benefit of the creditors, and as such he is familiar with the facts herein involved; that he has read the foregoing answer and knows the contents thereof; that the same is true, of his own knowledge, both in substance and in fact, except as to those matters therein stated on

information and belief, and as to those matters he believes them to be true.

H. B. HERSHEY

Subscribed and sworn to before me this 3rd day of March, A. D. 1938.

[Seal] ELIZABETH LOVE
Notary Public in and for
Christian County, Illinois.

My Commission Expires: Nov. 24, 1939.

[Endorsed]: Filed Mar. 14, 1938. [29]

[Title of District Court and Cause.]

ANSWER OF J. G. VAUGHAN

To the Honorable David W. Ling, Judge of Said Court:

Comes now J. G. Vaughan, one of the defendants in the above entitled and numbered cause, and files this his original answer herein, and with respect would show to the Court:

I.

Your defendant would show to the Court that he is without knowledge of each and all of the allegations as made in Complainant's original bill of complaint, and that he is particularly without knowledge of the allegations as made in paragraph XIX, pages 10 and 11 of the Complainant's bill of complaint.

II.

Your defendant would further show that he neither owns, claims nor asserts any right, title, interest or right of possession in or to the premises described in Complainant's bill of complaint.

Wherefore, this defendant enters this his answer and disclaimer and prays that no costs be adjudged against him.

CECIL A. MORGAN
Fort Worth, Texas,
Counsel for defendant,
J. G. Vaughan.

[Endorsed]: Filed May 24, 1937. [31]

[Title of District Court and Cause.]

FIRST AMENDED BILL OF COMPLAINT

Comes now your Orator, and with leave of this Court first had and obtained, files this his First Amended Bill of Complaint against the defendants, in lieu of the original complaint filed herein on the twenty-second day of March, A. D. 1937, and alleges and respectfully shows:

I.

That this is a suit in equity wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars, and wherein the controversy arises and exists between citizens of different states, that is to say:

That your orator is a citizen and resident of the City and County of Santa Fe, in the State of New Mexico, and that he is the duly qualified and acting Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico with respect to the assets in, and belonging in a fund deposited with said Superintendent of Insurance pursuant to [33] and in compliance with Section 38 of Chapter 48 of the Laws of the then Territory of New Mexico enacted in the year 1909, a true copy of which said enactment is hereto attached, marked "Exhibit A" and made by reference a part hereof, which said fund was created and stands, under said law, as security for the full legal reserve of policies registered thereunder, heretofore issued by National Life Insurance Company of the Southwest, a corporation heretofore organized and doing business under the laws of the State of New Mexico, and the liabilities under which said policies were assumed successively by the Two Republics Life Insurance Company, a Texas corporation, and Mississippi Valley Life Insurance Company, an Illinois corporation, and that your orator is so acting as such Liquidating Receiver pursuant to appointment by the District Court of the County of Santa Fe, State of New Mexico, a court having general jurisdiction in law and equity in a certain cause therein pending, being numbered 14867 on the Civil Docket of said Court, wherein one Richard C. Dillon is plaintiff and George M. Biel, now Superintendent

of Insurance of the State of New Mexico, is, among others, a defendant, and that your orator brings this suit under authority of an order of said Court, a true copy whereof is hereto attached and marked "Exhibit B" and under authority of an assignment by said George M. Biel, Superintendent of Insurance as aforesaid, a true copy whereof is hereto attached, marked "Exhibit C", and made by reference a part hereof, and that the purpose of this suit is to liquidate a certain security in the nature of a real estate mortgage upon lands within the jurisdiction of this Court, constituting one of the securities deposited, as aforesaid, with said Superintendent of Insurance for the security of the legal reserve of the policies aforesaid, all as hereinafter more fully set forth.

That Republic Life Insurance Company of Dallas, Texas, is an insurance company organized as a corporation under the laws of the State of Texas, having its principal [34] office and place of business at Dallas, in said state, and a citizen and resident of said state; that defendant H. B. Hershey is a resident and citizen of the State of Illinois, his residence being in the city of Springfield, his post office address in said city being 515 Grand Avenue East; that defendants R. E. O'Malley and William E. Caulfield are each and both citizens and residents of the State of Missouri, residing in the City of St. Louis in said state, their post office address in said city being 715 A Chestnut

Street; that defendant J. G. Vaughan is a citizen and resident of the State of Texas, residing at Dallas in said state, his post office address being Thomas Building in said city; that defendants M. J. Dougherty, Grace V. Rowell, William H. Wallace and Anna Louise Wallace are and each of them is a citizen of the State of Arizona and a resident of the County of Maricopa in said state, and R. L. Daniel, plaintiff is informed and believes, is the Chairman of the Board of the Insurance Commission of the State of Texas, and resides at Austin, Texas.

That the defendants Republic Life Insurance Company of Dallas, Texas, H. B. Hershey, Receiver of Mississippi Valley Life Insurance Company, J. G. Vaughan, and M. J. Dougherty, have all answered and are before the Court. That the Receivers of the Mississippi Valley Life Insurance Company under appointment of the Circuit Court of the City of St. Louis, Missouri, have heretofore filed a disclaimer of any interest in the property in controversy, and the defendant O. E. Patterson was heretofore dismissed as a defendant in this cause.

II.

That from the year 1909 the insurance laws of the State of New Mexico contained a certain statute enacted as Section 38 of Chapter 48 of the Laws of the then Territory of New Mexico of 1909, which said statute was thereafter re-enacted as Section

2859 of the New Mexico Statutes Annotated, Codification of 1915, a true copy of which is hereto attached, marked "Exhibit A" and made by reference a part hereof. [35]

III.

That from the effective date of said Section 38 the Bank Examiner of the State of New Mexico was charged by law with the administration of the insurance laws of said state, and with the supervision of insurance companies doing business therein, and particularly charged with the duty of administering said Section 38.

IV.

That in the year 1925 a new insurance code was adopted in the State of New Mexico, in and by which Section 38, aforesaid, was repealed, and was included, and now remains in force as Section 55 of Chapter 135 of the said Laws of 1925, thereafter compiled as Section 71-155 of the New Mexico Statutes Annotated, Compilation of 1925, a true copy whereof is hereto attached, marked "Exhibit D" and made by reference a part hereof; which said repeal and said foregoing provision became effective on, to-wit: March 20, 1925; and in and by which said new code the office of Superintendent of Insurance was created and invested with all powers and duties theretofore appertaining to the office of State Bank Examiner, and from which day said Superintendent of Insurance was, and thenceforth has been charged by law with the administration

of the insurance laws of the said State of New Mexico and with the supervision of insurance companies doing business therein, and particularly charged with the duty of administering and enforcing said Section 71-155 (Exhibit D).

V.

That while the statute first above referred to was in effect in said State of New Mexico, National Life Insurance Company of the Southwest, aforesaid, a corporation organized under and pursuant to the insurance laws of said state, issued a large number of policies which it procured to be registered pursuant to the provisions first aforesaid. [36]

VI.

That thereafter, and prior to the year 1923, said National Life Insurance Company of the Southwest sold and transferred all of its assets and business to The Two Republics Life Insurance Company, a corporation then duly organized, existing and operating under the laws of the state of Texas, which said The Two Republics Life Insurance Company assumed all of the obligations and liabilities, including the outstanding policy liabilities of said National Life Insurance Company of the Southwest.

VII.

That on, to-wit: the 16th day of January, 1923, said The Two Republics Life Insurance Company, being then the owner in fee of certain land situated

and being in the County of Maricopa, State of Arizona, described as follows, to-wit:

> The Southeast Quarter (SE¼) of Section Nineteen (19), Township One (1) North of Range Six (6) East of the Gila and Salt River Base and Meridian,

entered into a contract for the sale thereof to James Q. Wallace and Grace C. Wallace, they being husband and wife, a true copy of which said contract is hereto attached, marked "Exhibit E" and made by reference a part hereof; and which said executory contract was, on the 27th day of July, 1923, placed of record in the office of the County Recorder of the County of Maricopa, State of Arizona, in Book 19 of Agreements, at pages 203-7; wherein and whereby the said Wallaces, in addition to any sum which may have been paid by them upon the execution and delivery of said contract, agreed to make further payments in sum aggregating Thirty-two Thousand Two Hundred Fifty-five and no/100 Dollars ($32,255.00); which said executory contract was deposited, in accordance with its provisions, in escrow in the Salt River Valley Trust & Savings Bank of Mesa, Arizona, together with a warranty deed duly signed and acknowledged by said The Two Republics Life Insurance Company, conveying the lands aforesaid to said Wallaces, and a quit claim deed, duly signed and acknowledged by said Wallaces, conveying the lands aforesaid to the said The Two Republics Life Insurance Com-

pany. [37] And it was provided by said executory contract that upon performance of the terms and conditions of said contract by the said Wallaces to be performed, said The Salt River Valley Trust & Savings Bank, escrow holders aforesaid, should deliver to said Wallaces the warranty deed aforesaid; and it was further provided that if the said Wallaces should make default in the terms and conditions of said contract by them to be performed, said escrow holder should return to said The Two Republics Life Insurance Company the warranty deed aforesaid, and deliver to said The Two Republics Life Insurance Company the quit claim deed aforesaid.

VIII.

That on, to-wit: the 5th day of April, 1923, said The Two Republics Life Insurance Company executed and delivered to the then State Bank Examiner of the State of New Mexico a certain document captioned "Assignment of Securities", a true copy whereof is hereto attached, marked "Exhibit F" and made by reference a part hereof, in and by which assignment it was the purpose and intent of the said The Two Republics Life Insurance Company, and of said State Bank Examiner to create a lien in favor of said State Bank Examiner in the sum of Thirty Thousand and no/100 Dollars ($30,000.00), upon the payments by said Wallaces to be made, as vendees, and upon the lands aforesaid, as security for the holders of

registered policies of the National Life Insurance Company of the Southwest, pursuant to the requirements of said Section 38 of Chapter 48 of the Laws of 1909 (Exhibit A).

IX.

That thereafter, and on, to-wit: the 25th day of April, 1923, said The Two Republics Life Insurance Company, and the said Wallaces modified the executory contract aforesaid (Exhibit E), by a supplemental agreement, bearing said date, a true copy whereof is hereto attached, marked "Exhibit G" and made by reference a part hereof. [38]

X.

That thereafter, and on, to-wit: the 27th day of July, 1923, said The Two Republics Life Insurance Company made, executed and delivered to the then State Bank Examiner of the State of New Mexico another document, captioned "Assignment of Securities", a true copy whereof is hereto attached, marked "Exhibit H" and made by reference a part hereof, in and by which said assignment it was the purpose of the said The Two Republics Life Insurance Company and the said State Bank Examiner to confirm the lien aforesaid, and to fix its amount in the sum of Thirty-two Thousand Two Hundred Fifty-five and no/100 Dollars ($32,255.00), as security aforesaid.

XI.

That thereafter, and on, to-wit the 15th day of May, 1924, for the purpose of facilitating and mak-

ing safer and more effective the lien aforesaid, and in compliance with the requirement of the then State Bank Examiner, said executory contract (Exhibit E) was again modified by a supplemental agreement, a true copy of which is hereto attached, marked "Exhibit I" and made by reference a part hereof; in and by which supplemental agreement the said State Bank Examiner was substituted as escrow holder in place of said Salt River Valley Trust & Savings Bank of Mesa, Arizona, and, pursuant to which said supplemental agreement (Exhibit I), said executory contract (Exhibit E), together with said supplemental agreements and said warranty deed and said quit claim deed were withdrawn from said Salt River Valley Trust & Savings Bank of Mesa, Arizona, and placed and deposited with said State Bank Examiner; and which said designation as escrow holder and said deposit were, by said State Bank Examiner, accepted in connection with, and to accomplish and effectuate the lien aforesaid, for the purpose and security aforesaid.

XII.

That thereafter, and on, to-wit: the 3rd day of March, 1928, said The Two Republics Life Insurance Company [39] sold and transferred all of its assets and business to the Mississippi Valley Life Insurance Company, a corporation then duly organized, existing and operating under the insurance laws of the State of Illinois, which said Mississippi Valley Life Insurance Company assumed all of the

liabilities and obligations of said The Two Republics Life Insurance Company, including the policies issued and registered, as aforesaid, by said National Life Insurance Company of the Southwest, under and pursuant to the provisions of said Section 38 of Chapter 48 of the Laws of 1909, which said transfer was, on the 4th day of June, 1928, placed of record in the office of the County Recorder of said County of Maricopa, State of Arizona, in Book 223 of Deeds, at page 74; and pursuant to, and in connection with which said transfer said The Two Republics Life Insurance Company executed and delivered to said Mississippi Valley Life Insurance Company a conveyance of the lands hereinbefore described, which said conveyance was, on June 4th, 1928, placed of record in the office of said County Recorder, in Book 223 of Deeds, at page 74, and which said conveyance, after being so recorded, said Mississippi Valley Life Insurance Company deposited with the then Superintendent of Insurance of the State of New Mexico to further effectuate, and as further evidence of the lien effected, and intended to be effected by said escrow contracts of said purchase and sale.

XIII.

That at the time of the transfer last aforesaid, said Wallaces' escrow contract of purchase and sale was held and listed by said Superintendent of Insurance as security, as aforesaid, and as a lien, as aforesaid, in the amount of Thirty-two Thousand

Two Hundred Fifty-five and no/100 Dollars ($32,-255.00), for the purpose aforesaid, all of which was well known to, and understood by the said Mississippi Valley Life Insurance Company. [40]

XIV.

That thereafter, and in the month of July, 1928, the said James Q. Wallace died, and said Grace V. Wallace was appointed and qualified as administratrix of the estate of said Jmes Q. Wallace, and said Mississippi Valley Life Insurance Company, having acquired, as aforesaid, the legal title to the lands aforesaid, subject to the vendees' rights in said executory contract, and subject to the lien aforesaid for the security of the holders of registered policies, aforesaid, elected and agreed with said Grace V. Wallace, administratrix, as aforesaid, to continue and keep the said executory contract alive in the name and right of said administratrix, and was thereafter extended by Grace V. Wallace and Mississippi Valley Life Insurance Company for two years after January 16, 1931; and on March 18th, 1929, said Mississippi Valley Life Insurance Company made and delivered to said State Superintendent of Insurance, under the name and designation of State Bank Examiner, an "Assignment of Security", a true copy whereof is hereto attached, marked "Exhibit J", and made by reference a part hereof, the purpose and intent whereof was to confirm and renew the lien of security, aforesaid, in the amount of Thirty-two Thousand

and no/100 Dollars ($32,000.00); and which said lien and security, as thus renewed and confirmed, was thereafter held and listed by said Superintendent of Insurance, and came, in such form, into the hands of your orator as Liquidating Receiver.

XV.

That thereafter, and on, to-wit: the 25th day of April, 1932, said Mississippi Valley Life Insurance Company became insolvent, and proceedings ensued by virtue of which the business and affairs of said insolvent corporation are now in the hands of defendants, the Receivers hereinbefore named, and its asests are in process of liquidation by said Receivers. [41]

XVI.

That on, to-wit: the 18th day of May, 1932, the then Receivers of the said Mississippi Valley Life Insurance Company entered into a contract, a copy whereof is hereto attached and marked "Exhibit K", with defendant Republic Life Insurance Company of Dallas, Texas, in and by which said defendant agreed to assume the policy obligations of said Mississippi Valley Life Insurance Company, including the aforesaid registered policies issued by the National Life Insurance Company of the Southwest, but charging against each policy so assumed a lien in the amount of the whole legal reserve thereon; but which said contract did not, as said Superintendent of Insurance understood the same, or was advised, effect or contemplate any

transfer of title to the lands aforesaid; and, as your orator is informed and believes, and alleges on such information and belief, there never was, or has been any transfer of title to said lands, except as hereinafter stated; and that defendant Republic Life Insurance Company of Dallas, Texas, entered into the contract aforesaid with full knowledge that said Superintendent of Insurance had, was entitled to and claimed a lien upon the lands aforesaid, in the amount and for the purposes aforesaid, as your orator is informed and believes, and alleges on such information and belief.

XVII.

That thereafter, and on August 22, 1932, one E. H. Banta, claiming to be the owner of the lands aforesaid by transfer of the escrow contract, aforesaid by Republic Life Insurance Company of Dallas, Texas, but who in fact had no legal or equitable title to said land or escrow contract, commenced suit in the Superior Court of Maricopa County, Arizona, against A. O. Pelsue, as Receiver of Mississippi Valley Life Insurance Company, appointed August 22, 1932, which suit resulted in a certain decree, dated August 22, 1932, adjudging said Banta to be the owner in fee simple of the lands aforesaid, and ordering said Receiver to execute to [42] said Banta a deed therefor, which said decree was thereafter recorded in the office of the County Recorder of Maricopa County, Arizona, in Book 267 of Deeds, at pages 349-50 thereof.

And that the said A. O. Pelsue, as such Receiver, did, on August 22, 1932, pursuant to said decree, execute to said Banta a certain quit claim deed conveying the said lands, which said deed is of record in the office of said County Recorder in Book 267 of Deeds, at pages 350-1 thereof.

That thereafter, and on September 10, 1932, defendant Republic Life Insurance Company of Dallas, Texas, executed and delivered to said Banta a warranty deed conveying the lands aforesaid, which deed is of record in the office of the County Recorder of Maricopa County, State of Arizona, in Book 267 of Deeds, at pages 550-51 thereof; and the Republic Life Insurance Company on said date had and owned no title to said property.

That on said September 10th, 1932, Grace V. Rowell, formerly Grace V. Wallace, and widow of James Q. Wallace, deceased, then wife of F. D. Rowell, (joined pro forma by her husband), individually and as administratrix of the Estate of James Q. Wallace, deceased, executed and delivered to said Banta a warranty deed purporting to convey the lands aforesaid, which deed is recorded in the office of the County Recorder of said County of Maricopa, State of Arizona, in Book 267 of Deeds, at pages 536-7 thereof; that said deed was delivered pursuant to a contract made on August 20, 1932, between said Grace V. Rowell of one part and defendant Republic Life Insurance Company of the other part, which recognized the escrow contract, but the contract of sale or deed was not authorized

by the court nor confirmed by the court, as in the statutes in such cases made and provided, and did not sell the interest of the estate or of the minor children, William H. Wallace and Anna Louise Wallace.

XVIII.

That the said E. H. Banta was on said date a Vice-President of defendant Republic Life Insurance Company of Dallas, [43] Texas, and that said Banta personally negotiated with the Receivers aforesaid the agreement (Exhibit K), brought the suit No. 37799 in the Superior Court of Maricopa County, Arizona, entitled Banta vs. Pelsue, aforesaid, and made the contract with Grace V. Rowell (formerly Grace V. Wallace), and had full knowledge and notice that the lands aforesaid were subject to the lien of the Superintendent of Insurance of the State of New Mexico for security, as aforesaid; and that said Superintendent of Insurance of the State of New Mexico had no knowledge or notice of, and was not a party to any of the various transactions, or the judgment aforesaid, by which said Banta procured for himself the various deeds aforesaid to said lands; and if the said Banta did thereby acquire legal title to the lands aforesaid, which plaintiff denies, such title is, in equity, subject to the lien aforesaid.

XIX.

That thereafter, and on March 13th, 1933, the said E. H. Banta executed and delivered to defend-

ant J. G. Vaughan a warranty deed conveying the lands aforesaid, which said deed is of record in the office of the County Recorder of Maricopa County, Arizona, in Book 272 of Deeds, at page 478; and, as your orator is informed and believes, and alleges on information and belief, defendant Vaughan was at said time an officer and employee of defendant Republic Life Insurance Company of Dallas, Texas, and had full knowledge and notice of the lien and right and claim of lien of said Superintendent of Insurance, and that defendant Vaughan took said title in trust for defendant Republic Life Insurance Company of Dallas, Texas, and thereupon executed and delivered to said defendant Republic Life Insurance Company of Dallas, Texas, a conveyance of said land which has been and is now withheld from record, and that defendant Republic Life Insurance Company of Dallas, Texas, claims to own said land and has since said date and since the filing of [44] this suit, and after demand made by plaintiff upon them for possession, obtained from J. G. Vaughan and his wife a deed to said property, which deed was filed for record in the Records of Maricopa County, Arizona, on the 12th day of April, 1938, and recorded in Book..... thereof, at page .....; and that thereafter the Republic Life Insurance Company transferred said property to R. L. Daniel, Chairman of the Board of the Insurance Commission of the State of Texas, and his successors in office, which deed was filed for record on April 12, 1938, and recorded in Book 321 of the

Deed Records of Maricopa County, Arizona, pages 317 and 318.

XX.

That defendant M. J. Dougherty, as your orator is informed and believes, and alleges on information and belief, has been, during the past three years, in possession of the lands aforesaid, living thereon, cultivating, using and enjoying the same, and claiming some interest therein, the nature and extent whereof is to your orator unknown, and that said defendant has, at all times, had full knowledge and notice of the lien and claim and right of lien of said Superintendent of Insurance.

XXI.

That plaintiff is informed and believes that by virtue of the deeds and transactions aforesaid, that Grace V. Rowell (formerly Grace V. Wallace) and the two minor children of James Q. Wallace, deceased, William H. Wallace and Anna Louise Wallace, who are minors, and R. L. Daniel, have and claim some interest in said property and are made parties so they may assert what rights they may have thereto, but whatsoever it may be, plaintiff says it is subject to the lien and claim of this plaintiff. That said property is the separate property of Grace V. Rowell, and for that reason her husband, F. D. Rowell, is not joined. That William H. Wallace and Anna Louise Wallace have no guardian and this suit involves their interest, so the

Court should appoint some suitable person as [45] guardian ad litem to represent them herein.

XXII.

That defendant Republic Life Insurance Company of Dallas, Texas, is not, and never has been licensed or authorized to do business in the State of New Mexico, and has never submitted to the jurisdiction or authority of said Superintendent of Insurance, nor of his predecessors in office, and has not at any time since its undertaking to assume the risks and liabilities of the Mississippi Valley Life Insurance Company, as aforesaid, including the said registered policies issued by the National Life Insurance Company of the Southwest, complied, or offered or pretended to comply with the requirements of said Section 38 of Chapter 48 of the Laws of 1909, or with Section 71-155 of the New Mexico Statutes Annotated, Compilation of 1929 (Exhibit D); and that since the insolvency of the said Mississippi Valley Life Insurance Company, as aforesaid, said Superintendent of Insurance has had no power to require defendant Republic Life Insurance Company of Dallas, Texas, to maintain a deposit of securities for the statutory purpose aforesaid, or to substitute other securities for any such as had become impaired in value or safety, and has been compelled to rely upon the securities in his hands at the date of such insolvency.

XXIII.

That said Superintendent of Insurance was not a party to either the aforesaid receivership proceedings in the State of Arizona, entitled Dougherty vs. Mississippi Valley Life Insurance Company, No. 37332, or the said suit in said State by E. H. Banta against said A. O. Pelsue as receiver, being No. 37799, both on the docket of the Superior Court of Arizona in and for Maricopa County; and, as your orator is informed and believes, and alleges on information and belief, said Superintendent of Insurance had no notice or knowledge thereof until, to-wit: November, 1935; nor any knowledge or notice [46] prior to said time that there had been an attempted surrender and merger of the interest of the Wallaces, as vendees, in said executory contract; nor of any of the other transactions hereinbefore set forth by means whereof said E. H. Banta and defendant Republic Life Insurance Company of Dallas, Texas, intended and attempted to subvert, circumvent and defeat the lien aforesaid; all of which were concealed from said Superintendent of Insurance, and all of which proceedings were void upon their face and cannot and do not affect the lien or claim of this plaintiff.

XXIV.

That your orator did by telegram on the 17th day of March, A. D. 1937, and again on or about the 13th day of April, A. D. 1937, through his attorney make a demand upon the defendant Republic Life In-

surance Company of Dallas, Texas, for an acknowledgment and payment of the lien of the plaintiff, and demand for possession of the property, and said defendant did not reply to the first demand and refused the second demand made for the possession of the property.

XXV.

That as fully appears from the allegations foregoing, your orator is without remedy in the premises except in a court of equality, and will suffer irreparable loss and injury, that is to say, the complete loss of the said lien, unless afforded the relief herein prayed.

Wherefore, premises considered, may it please Your Honor to grant to your orator the following orders, judgments and decrees:

1. That the defendants, Republic Life Insurance Company of Dallas, Texas, H. B. Hershey, Receiver of Mississippi Valley Life Insurance Company, J. G. Vaughan and M. J. Dougherty are before the Court by their answers herein, and Joseph B. Thompson and William E. Caulfield, Receivers of the Mississippi Valley Life Insurance Company under the appointment in Missouri, [47] have filed a disclaimer, and a copy hereof will be duly served upon all of said defendants at the addresses shown on their respective appearances.

2. That the Court appoint a guardian ad litem to represent William H. Wallace and Anna Louise Wallace, and that subpoenas issue directed to Grace

V. Rowell and said guardian ad litem to appear and answer the allegations hereof.

3. That R. L. Daniel, Chairman of the Board of the Insurance Commission of the State of Texas, is a citizen and a resident of Austin, Travis County, Texas, and that process be issued for service outside the District of Arizona upon said R. L. Daniel, commanding him to appear and plead, answer or demur in said cause on a day certain to be designated by this Court, and directing that said order be served upon the defendant pursuant to the provisions of the United States Code Annotated, Section 118 of Title 28.

4. And your orator further prays that after hearing herein the Court render its decree declaring and establishing a lien in the nature of a mortgage, in favor of your orator, upon the lands hereinbefore described, and the appurtenances thereto, in the sum of Thirty-two Thousand and no/100 Dollars ($32,000.00), and declaring and establishing such lien to be superior and prior to any and all interest or claim of each and all of the defendants; such lien to be had and held by your orator, as such Liquidating Receiver, as an asset of his said trust and to be enforced, applied and distributed as a security deposited pursuant to the provisions of said Section 38 of Chapter 48 of the Laws of New Mexico of the year 1909, for the security of the full legal reserve of policies of said National Life Insurance Company of the Southwest issued and registered thereunder.

5. And your orator further prays that, having declared and established such lien, the Court further decree the [48] amount thereof to be presently due and payable, and that unless the defendants, or some of them, pay off and satisfy the amount thereof within a time by such decree to be specified, your orator may and shall have foreclosure thereof, and that said lands be sold in the manner provided by law for the foreclosure of liens or mortgages on real estate, and according to the rules and practice of this Court for the satisfaction of said sum of Thirty-two Thousand and no/100 Dollars ($32,000.00).

6. And your orator further prays for such other, further or different relief in the premises as to Your Honor may appear meet and equitable.

And your orator will ever pray, etc.

JOHN T. WATSON.

WILSON & WATSON,
Post Office Address:
Sena Plaza, Santa Fe,
New Mexico.

FRED C. KNOLLENBERG,
Post Office Address:
415 Caples Bldg.,
El Paso, Texas.
Attorneys for Orator.

State of New Mexico,
County of Santa Fe—ss.

John T. Watson, being first duly sworn according to law, says that he is the person named in, and

who signed the foregoing First Amended Bill of Complaint; that he has read the same and knows and understands the contents thereof, and that the allegations thereof are true of his own knowledge, except as to such thereof as are made on information and belief, and as to such allegations he believes them to be true.

JOHN T. WATSON.

Subscribed and sworn to, before me, this 9th day of June, A. D. 1938.

[Notarial Seal] ANNABELLE K. DAVIS,
(formerly Annabelle Kennedy)
Notary Public.

My commission expires: July 10, 1938. [49]

EXHIBIT A

SESSION LAWS OF NEW MEXICO
1909
CHAPTER 48

Section 38. Any life insurance company now or hereafter organized in this Territory may register any of its policies with the insurance department and deposit with the Superintendent of Insurance, approved securities to the amount of not less than the net value of all such policies registered and said policies shall bear upon their face a certificate in the following words:

> "Insurance Department, Territory of New Mexico. This policy is registered with this department and the full legal reserve thereon is

secured by approved securities on deposit with the Superintendent of Insurance in the Territory of New Mexico as provided by Law."

Which certificate shall be signed by the Superintendent of Insurance or his authorized deputy and sealed with the seal of his office.

These policies shall be known as "Registered Policies" and said Superintendent of Insurance shall prepare and keep such register thereof as will enable him to compute their value at any time:

Provided, That all companies registering any policies under this act shall at all times keep the amount of securities on deposit with the Superintendent of Insurance equal to the amount of the legal reserve under such policies then in force;

Provided, That the Superintendent of Insurance shall make a charge of fifty cents for affixing the seal of his office and registering any such policies.

[50]

EXHIBIT B

State of New Mexico,
County of Santa Fe

In the District Court

No. 14,867

RICHARD C. DILLON for Himself and Others Similarly Situated,

Plaintiff,

vs.

GEORGE M. BIEL, (Substituted for Max Fernandez), Superintendent of Insurance of the State of New Mexico; JOSEPH B. THOMPSON and WILLIAM B. CAULFIELD, Receivers of Mississippi Valley Life Insurance Company, a Corporation, Appointed by the Circuit Court of the City of St. Louis, Missouri; H. B. HERSHEY (substituted for Alvin S. Keys) Receiver of Said Mississippi Valley Life Insurance Company Under Order of the Circuit Court of Sangamon County, Illinois; and REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, a Corporation,

Defendants.

ORDER

The Court having been advised by John T. Watson Referee and Receiver herein, that the services of Fred C. Knollenberg, Attorney at Law, have been secured in accordance with the order entered

herein on February 2nd, and as evidenced by the memorandum agreement filed herein; and it appearing to the Court that the assets now in the hands of the Receiver are insufficient to pay all claims now filed or to be filed herein; and it further appearing that it is to the best interests of the policy-holders and claimants in this Receivership to immediately file suit against the present claimants and holders of the tract of land known as the Wallace property and more fully described in the Report of John T. Watson, Receiver, as item seven, said property being described as the Southeast Quarter, Section 19, Township 1 North, Range 6 East of the Gila and Salt River Base and Meridian of Maricopa County, Arizona.

It Is Therefore Ordered and Decreed that John T. Watson Receiver herein forthwith proceed with suit in the Arizona State or Federal courts after first having obtained and received permission from said Court to bring action to establish the lien, rights, interest or title in and to said property in his name as Receiver for the benefit of the policy-holders and claimants herein.

(Signed) DAVID CHAVEZ, JR.,
District Judge. [51]

EXHIBIT C

ASSIGNMENT

Know All Men by These Presents, that the undersigned George M. Biel, duly appointed, qualified and acting Superintendent of Insurance of the

State of New Mexico, for a good and valuable consideration, has assigned and transferred and by these presents does assign, transfer and set over unto John T. Watson, Liquidating Receiver, duly appointed, qualified and acting by and pursuant to and under an order of the District Court of the County of Santa Fe, State of New Mexico, in a certain cause therein pending, being Number 14867 on the Civil Docket of said Court wherein one Richard C. Dillon is plaintiff and the undersigned, Superintendent of Insurance as aforesaid is, among others, a defendant, all of the right, title and interest of the undersigned in and to the following described lands, situate and being in the County of Maricopa, State of Arizona, to-wit:

> The Southeast Quarter (SE¼) of Section Nineteen (19) Township One (1) North of Range Six (6) East of the Gila and Salt River Base and Meridian.

It is expressly understood that the interest hereby transferred is a lien upon the lands aforesaid in the nature of a mortgage created and existing by and through the deposit of certain documents by the Two Republics Life Insurance Company of El Paso, Texas, and thereafter by Mississippi Valley Life Insurance Company an Illinois corporation, with the Undersigned in his capacity as Superintendent of Insurance for the security of the full legal reserve of policies of insurance issued by National Life Insurance Company of the Southwest

and registered pursuant to the provisions of Section 38, Chapter 48 of the Laws of New Mexico of the year 1909, and that the purpose of this assignment is to invest the assignee, Liquidating Receiver as aforesaid, with full power and authority to sue for and recover said lien and to have the same established and enforced by foreclosure or otherwise for the purpose of realizing upon the same for the security of such policy-holders, and to that end the undersigned does hereby invest said assignee with every power which the undersigned had in the premises prior to the commencement of said Cause No. 14867.

In Witness Whereof, the assignor has hereunto set his hand and seal this 18th day of March, 1937.

(Sgd.) GEORGE M. BIEL,
Superintendent of Insurance
of the State of New Mexico.
[52]

State of New Mexico,
County of Santa Fe—ss.

On this 18th day of March, 1937, personally appeared before me George M. Biel, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same in his capacity as Superintendent of Insurance of the State of New Mexico, as his free act and deed.

In Witness Whereof, I have hereunto signed my name and affixed my notarial seal the day and year in this acknowledgment first above written.

[Seal] (Sgd.) COSME R. GARCIA,
Notary Public.

My Commission Expires: July 26, 1939. [53]

EXHIBIT D

NEW MEXICO COMPILED LAWS OF 1929 SECTION 71-155

Registered Policies. When any policies have heretofore been registered with the insurance department of the state of New Mexico or with the office of the bank examiner under the conditions of section 38, chapter 42 (Rep.), of the session laws of the year 1909, it shall be the duty of the superintendent to maintain a register of such policies in a form that will enable him to compute the net value of such policies at any time, and it shall be the duty of each company having any such registered policies in force to semi-annually supply the superintendent with a certified list of the net value of all such registered policies in force as at that date, and to at all times maintain approved securities of one of the kinds authorized as an investment for any insurance company with the corporation commission of an amount equal to the said net value, and whenever it be shown that the amount of said securities so on deposit is in excess of the net value

of the registered policies of such company the amount of such excess shall be immediately released and delivered to the company; Provided, that in computing the net value of any policies so registered credit shall be allowed on each policy for the amount of any outstanding policy loan or lien secured exclusively by the cash or loan values of said policy. (L. '25, ch. 135, Sec. 55.) [54]

EXHIBIT E

AGREEMENT

This Agreement, made and entered into this 16th day of January, 1923, between The Two Republics Life Insurance Company, a corporation organized and existing under the laws of the State of Texas with its principal place of business at El Paso, Texas, the party of the first part, and James Q. Wallace and Grace V. Wallace, parties of the second part.

Witnesseth:

That the said party of the first part in consideration of the covenants and agreements on the part of the said parties of the second part, herein contained, agrees to sell and convey unto said parties of the second part, and said parties of the second part agree to buy, all that certain lot, tract and parcel of land situate in the county of Maricopa,

State of Arizona bounded and described as follows, to-wit:

> The Southeast Quarter (SE¼) of Section Nineteen (19) Township One (1) North of Range Six (6) East of the Gila and Salt River Base and Meridian.

For the sum of thirty-two thousand two hundred fifty-five ($32,255.) Dollars, gold coin of the United States; and the said parties of the second part, in consideration of the premises, agree to pay to the said party of the first part the sum of Thirty-two Thousand Two Hundred Ffty-five ($32,255.00) Dollars, in United States gold coin as follows, to-wit:

$ 1,000.00 January 16th, 1924,
$ 1,000.00 January 16th, 1925,
$ 1,500.00 January 16th, 1926,
$ 1,500.00 January 16th, 1927,
$27,255.00 January 16th, 1928,

All deferred payments to bear interest at the rate of 6% per annum payable annually and if not so paid to be added to the principal and bear interest at the same rate.

And the said parties of the second part hereby covenant and agree with the said party of the first part, its successors and assigns, as follows:

To pay all state, city and county taxes and assessments of whatever nature which are, or may become due on the premises above described, and if not paid, that the said party of the first part may pay

such taxes, liens or assessments and be entitled to interest on the same at the rate of 6% per annum.

To keep all buildings, fences and other improvements on said real estate in as good repair and condition as the same are in at this time, and to permit no waste.

To keep the buildings on said premises insured in some fire insurance company, paying all charges therefor, in the name of the Two Republics Life Insurance Company. In case of failure [55] to keep said buildings so insured and deliver the policy to the party of the first part, as agreed, said party of the first part may effect such insurance, and the amount so paid, with 6% per annum, shall be immediately due and payable by the said parties of the second part.

To purchase and pay for all irrigation water used upon said premises, and all water assessments which may be made thereon, as the same become due and payable, and in case of failure of the second parties to purchase and pay for said water and assessments said party of the first part may purchase and pay for the same, and the amount so paid with interest at 6% per annum shall be immediately due and payable by the said parties of the second part.

To enter upon said premises and begin the farming thereof forthwith, and to farm said premises in a first class manner according to the rules of good husbandry.

To keep said premises and the roadway adjacent thereto reasonable clear of all Johnson grass and other obnoxious weeds.

To keep all ditches, laterals and borders upon said premises clean and in good condition for efficient use.

To re-pay to first party any proper and necessary sums paid by it to satisfy any established and existing liens against said premises said sums so paid by first party to be added to the principal herein and to bear interest at the rate of 6% per annum.

It is agreed that all sums herein provided to be paid by second parties to first party, the time or times of payment for which are not herein specifically fixed shall become due and payable on the 16th day of January, 192....

The parties of the second part agree to execute to the party of the first part a Quit Claim Deed, in form satisfactory to first party, for the premises above described, which Quit Claim Deed shall be placed in escrow with the Salt River Valley Trust & Savings Bank, Mesa, Arizona, under the terms and provisions hereinafter provided.

The party of the first part agrees to execute to the parties of the second part a Warranty Deed for the premises herein described, and to place the same, together with said Quit Claim Deed from second parties to first party hereinabove mentioned, and said promissory notes, and a copy of this agreement, in escrow with the Salt River Valley Trust & Savings Bank Mesa, Arizona, to be held by said Bank until the performance of this agreement, by the parties of the second part shall have been made in full and then said escrow holder shall deliver

said Warranty Deed and said Quit Claim Deed to the parties of the second part.

It is further agreed between the parties hereto that if the second parties shall fail or make default in any of their promises or agreements herein contained in the manner and at the time herein provided to be performed by them, and shall remain in default for a period of ten (10) days, such failure or default shall, at the option of first party, terminate this agreement, and all payments made hereunder and all improvements made upon [56] said premises and crops growing thereon, shall be considered as liquidated damages, and shall belong to the party of the first part, free and clear of all claims, charges and demands of the second parties.

In the event of the failure of the second parties to perform their covenants and agreements hereon contained in the manner and at the time herein prescribed, the said escrow holder shall re-deliver said Warranty Deed, together with the copy of this agreement held by it, and said Quit Claim Deed above mentioned, to first party upon its demand in writing and shall return to the second parties all notes accompanying this agreement remaining unpaid at the date of return of said Warranty Deed and other papers above mentioned, and the said escrow holder shall thereupon become relieved of all duties and liabilities arising under this contract; and the said parties hereto, for the purpose herein mentioned, hereby constitute and appoint the said escrow holder their agent for the purpose of per-

forming the duties of escrow holder herein provided.

The various remedies herein given to the party of the first part shall be cumulative and not restrictive, and the exercise of any one remedy by said party of the first part, shall not be construed to deprive it of the right to exercise any other remedy herein provided, or which may exist by the laws of the State of Arizona.

It is further understood and agreed by and between the parties hereto that no assignment of this contract, or any interest therein, will be of any force or effect, unless the assignee or assigns, shall make, execute and deliver to The Salt River Valley Trust & Savings Bank Mesa, Arizona, escrow holder herein their Quit Claim Deed, in form satisfactory to first party, conveying to the first party the premises hereinbefore described and a copy of said assignment; and in case the said assignee or assigns of said interest of second parties in said contract shall fail, neglect or refuse to carry out each and every promise and agreement on the part of the second parties herein contained within the time herein limited, and strictly as herein provided, then and in that event the said escrow holder is instructed and directed to deliver said Quit Claim Deed together with said other papers to the party of the first part upon demand, as hereinbefore provided.

Time is the essence of this contract, and the terms conditions and provisions hereof shall extend to and be binding upon the heirs, executors, administrators and lawful assigns of each of the parties hereto.

In Witness Whereof, the said party of the first part has caused these presents to be executed by its President and Secretary and its corporate seal hereunto annexed, and the second parties have hereunto set their hands and seals the day and year first above written.

(Sgd.) JAMES Q. WALLACE,
(Sgd.) GRACE V. WALLACE,
[Seal] THE TWO-REPUBLICS
LIFE INS. CO.,
(Sgd.) A. H. RODES, Pres.
(Sgd.) JOHN H. UPTON, Secy. [57]

State of Arizona,
County of Maricopa—ss.

On this 5th day of March, 1923, before me personally appeared James Q. Wallace and Grace V. Wallace, his wife, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 5th day of March, 1923.

[Seal] (Sgd.) M. J. DAUGHERTY,
Notary Public.

My Commission Expires Feb. 26th, 1924.

State of Texas,
County of El Paso—ss.

On this the 30th day of April, A. D. 1923, before me appeared A. H. Rodes, Pres. and John H. Upton, Secy., both to me personally known, who, being by me duly sworn, did say that they are respectively the President and Secretary of the Two Republics Life Insurance Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said A. H. Rodes, Pres. and John H. Upton, Secy., acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and the seal of my office at El Paso, in El Paso County, Texas, this 30th day of April A. D. 1923.

[Seal] (Sgd.) IRENE STEWARD,
Notary Public.

My Commission Expires: May 31st, 1923. [58]

EXHIBIT F

ASSIGNMENT OF SECURITIES

No. 1

Whereas The National Life Insurance Company of the Southwest, of Albuquerque, New Mexico, a life insurance company organized and doing busi-

ness in this State, has registered its policies with the Insurance Department and has deposited with such Department approved securities to an amount of not less than the net value of all policies so registered; and whereas such securities, while so on deposit, and the proceeds thereof, may be used by the state of New Mexico for the purpose of fully protecting any and all holders of policies so registered, and all obligations to the State in this connection.

Therefore, said Company by its successor, The Two-Republics Life Insurance Company of El Paso, Texas, first party, hereby and herewith, in consideration of the foregoing, sells, assigns, and transfers to the State of New Mexico, second party, all the rights, title, and interest of first party in and to the securities now on deposit as aforesaid, described as follows, to-wit:

No.	Name	Amount	Date Due
8	Gray	$ 5,000	10- 5-22
9	Beck	3,000	10- 1-22
10	Gonzales	2,000	10- 1-21
12	Gibson	3,500	10- 8-22
14	Smith Realty Co.	7,500	8-15-23
25	Martin	10,000	2-16-23
23	Fitzgerald	10,000	1-29-23
26	Milbourn	2,500	2-18-23
32	Jaffe Praeger	15,000	12-1-24
33	Newson	3,300	12-17-24
36	Cunningham	7,000	12-15-24
38	Albright	8,840	4-25-23
39	Wallace, J. R.	22,000	Process of Transfer
40	Wallace, J. Q.	30,000	Process of Transfer
41	Hardwick	12,500	9-13-25

No.	Name	Amount	Date Due
42	Medley	$ 5,000.00	10-15-25
43	Geer	5,000	11-24-25
44	Power	13,000	12- 9-25
54	Power	5,000	11-18-25
46	Porter	5,000	12- 9-25
53	Porter	2,500	11-29-23
55	Stauts	1,300	12- 9-24
59	Fox	6,000	6- 1-27
60	Jenkins	6,000	6- 3-27
65	Texier	5,000	8-15-27
72	Berry	2,500	9-26-25
73	McGee	8,000	9-27-25
74	Hubbel	3,500	10- 8-25
	Total	$209,940	

Said second party to have and to hold said securities for the purpose of satisfying just claims of any policy holder in case of possible default of said first party in the matter of satisfying the same, and for all the purposes hereinbefore mentioned. [59]

Whenever, in the opinion of the State Bank Examiner it may be proper or necessary for said Company to withdraw any or all of said securities from deposit, he may permit such withdrawal, executing an assignment back to said first party in the name of the State Bank Examiner.

Whenever, in the opinion of the State Bank Examiner, any security or securities are about to become barred by statute, doubtful as to sufficiency or other reason, the State Bank Examiner, by letter, may tender back to said first party such security or securities, whereupon it shall be necessary for first party to furnish forthwith other or addi-

tional approved security in lieu of all such securities so tendered back.

In witness whereof, said first party has officially signed and affixed its seal in duplicate this 5th day of April, 1923.

THE TWO-REPUBLICS
LIFE INSURANCE CO.,
First Party.

By (Sgd.) A. H. RODES,
President.

Attest:
(Sgd.) JOHN H. UPTON.

State of New Mexico,
County of Santa Fe—ss.

Received above securities the ..... day of ....., 19....., for the purpose specified herein. [60]

.....

EXHIBIT G

This Supplemental Agreement, made this 25th day of April, 1923, between The Two-Republics Life Insurance Company, a corporation, organized and existing under the laws of the State of Texas, with its principal place of business at El Paso, Texas, the party of the first part, and James Q. Wallace and Grace V. Wallace his wife, parties of the second part, Witnesseth:

That whereas the parties hereto did on the 16th day of January, 1923, enter into an agreement for

the purchase and sale of the following described premises, to-wit:

> The Southeast Quarter (SE¼) of Section Nineteen (19) Township One (1) North of Range Six (6) East of the Gila and Salt River Base and Meridian, Maricopa County, State of Arizona.

And whereas the parties hereto are desirous of providing for the payment of 8% interest on water and tax assessments and any other liens against said premises which are assessed and become due and payable hereafter and which are not now assessed, due or payable.

Now therefore, it is agreed that said Paragraphs II and III of said Page II, of said contract of January 16th, 1923, be, and the same is hereby amended to read as follows:

"And the said parties of the second part hereby covenant and agree with the said party of the first part, its successors and assigns, as follows:

To pay all State, City, and County taxes and assessments of whatsoever nature which are, or may become due on the premises above described and if not paid that the party of the first part may pay such taxes, liens or assessments and be entitled to interest on the same at the rate of 6% per annum. Provided, however, that party of the first part shall be entitled to interest at the rate of 8% per annum upon all such taxes, liens or assessments which it may be obliged to pay on taxes, liens or assessments

which are not now due or payable but which may hereafter be assessed and become due and payable, and provided further that as to taxes, assessments and liens which are now due and payable, and which first party agrees and contemplates paying, said interest at the rate of 6% per annum shall apply.

It is further agreed that said agreement of January 16, 1923, shall stand in all respects except as expressly modified herein.

In Witness Whereof the parties have hereunto set their hands and seals the day and year first above written.

(Sgd.) JAMES Q. WALLACE,
(Sgd.) GRACE V. WALLACE.
[Seal] THE TWO-REPUBLICS
LIFE INSURANCE CO.
By (Sgd.) A. H. RODES,
Pres.

Attest:
(Sgd.) E. L. CORIELL,
Assistant Secretary. [61]

State of Arizona,
County of Maricopa—ss.

On this 26th day of April, 1923, before me personally appeared James Q. Wallace and Grace V. Wallace his wife, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed

the same for the purposes and consideration therein expressed.

Given under my hand and seal of my office this the 26th day of April, 1923.

[Seal] (Sgd.) M. J. DAUGHERTY,
Notary Public.

My Commission Expires, February 26, 1924.

State of Texas,
County of El Paso—ss.

On this the 30th day of April, A. D. 1923, before me appeared A. H. Rodes and E. L. Coriell both to me personally known, who, being by me duly sworn, did say that they are respectively the President and Assistant Secretary of the Two-republics Life Insurance Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and the said A. H. Rodes and E. L. Coriell acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and the seal of my office at El Paso, in El Paso County, Texas, this 30th day of April, A. D. 1923.

(Sgd.) IRENE STEWART,
Notary Public.

My Commission Expires May 31st, 1923. [62]

EXHIBIT H

ASSIGNMENT OF SECURITIES

No. 5

Whereas The National Life Insurance Company of the Southwest, of Albuquerque, New Mexico, a life insurance company organized and doing business in the State, has registered its policies with the Insurance Department and has deposited with such Department approved securities to an amount of not less than the net value of all policies as registered, and whereas, such securities, while so on deposit, and the proceeds thereof, may be used by the State of New Mexico for the purpose of fully protecting any and all holders of policies so registered, and all obligations to the State in this connection.

Therefore, said Company by its successor, The Two-Republics Life Insurance Company of El Paso, Texas, first party, hereby and herewith, in consideration of the foregoing, sells, assigns, and transfers to the State of New Mexico, second party, all the right, title, and interest of first party in and to the securities enclosed herewith, described as follows, to-wit:

No.	Name	Amount	Date Due
40	James Q. Wallace	$33,255.00	January 16th, 1928
39	John R. Wallace	$25,340.75	January 1st, 1928
	R. P. Woodson, Jr.	$16,000.00	January 5th, 1931

Said second party to have and to hold said securities for the purpose of satisfying just claims of any

policy holder in case of possible default of said first party in the matter of satisfying the same, and for all the purposes hereinbefore mentioned.

Whenever, in the opinion of the State Bank Examiner, it may be proper or necessary for said Company to withdraw any or all of said securities from deposit, he may permit such withdrawal, executing an assignment back to said first party in the name of the State by the State Bank Examiner.

Whenever, in the opinion of the State Bank Examiner, any security or securities are about to become barred by statute, doubtful as to sufficiency or other reason, the State Bank Examiner, by letter, may tender back to said first party such security or securities, whereupon it shall be necessary for first party to furnish forthwith other or additional approved security in lieu of all such securities so tendered back.

In witness whereof, said first party has officially signed and affixed its seal in duplicate this 27th day of July, 1923.

THE TWO-REPUBLICS LIFE
INSURANCE COMPANY,
First Party,

By A. H. RODES,
Vice-President.

Attest:

JOHN H. UPTON,
Secretary.

State of New Mexico,
County of Santa Fe—ss.

Received above securities the 31st day of July, 1923, for the purpose specified herein.

WALTER B. WAGNER,
Deputy for Insurance. [63]

EXHIBIT I

This Agreement, made and entered into this 15th day of May, 1924, between the Two-Republics Life Insurance Company, a corporation, party of the first part, and James Q. Wallace and Grace V. Wallace, parties of the second part.

Witnesseth:

Whereas, the parties hereto did on the 16th day of January, 1923, enter into an agreement whereby the party of the first part agreed to sell to the parties of the second part certain real estate situated in the County of Maricopa, State of Arizona, and

Whereas, it was provided in said contract that certain deeds and notes were to be executed and placed in escrow with the Salt River Valley Trust & Savings Bank, of Mesa, Arizona, under certain terms and conditions more specifically set out in said contract between the parties thereto:

Now Therefore, in consideration of the mutual covenants and agreements herein contained, and the considerations expressed in the prior contract re-

ferred to, it is now understood and agreed between the parties hereto that the escrow agent named in said contract of January 16th, 1923, be released from all further responsibility in connection with the said escrow arrangement and in lieu thereof the parties hereto designate Mr. Walter B. Wagner, Deputy for Insurance of the State of New Mexico, and his successor or successors in office, as the escrow agent with whom shall be deposited all the papers now on deposit with the Salt River Valley Trust & Savings Bank, of Mesa, Arizona, to be governed in all respects by the same terms and conditions set out in said contract of January 16th, 1923, which said contract is not modified in any respect other than the change of the escrow agent named in said contract and the consent of the parties of the second part, hereby given, to the deposit with the Superintendent of Insurance of the securities referred to in said contract of January 16th, 1923.

In Witness Whereof, said parties hereto caused these presents to be executed the day and year in this instrument first above written.

[Seal] THE TWO-REPUBLICS LIFE INSURANCE COMPANY,

By (Sgd.) A. H. RODES,
President.

(Sgd.) JAMES Q. WALLACE,

(Sgd.) GRACE V. WALLACE,

Attest:

(Sgd.) HARRY W. LACKLAND,
Secretary.

State of Texas,
County of El Paso—ss.

On this the 15th day of May, A. D. 1924, before me appeared A. H. Rodes, President and Harry W. Lackland, Secretary, both to me personally known, who, being by me duly sworn, did say that they are respectively the President and Secretary of the Two-Republics Life Insurance Company, and that the seal affixed to the foregoing [64] instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said A. H. Rodes, President and Harry W. Lackland, Secretary, acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and the seal of my office at El Paso, Texas, in El Paso County, this the 15th day of May, A. D. 1924.

[Seal] (Sgd.) IRENE STEWART,
Notary Public in and for El Paso County, Texas.

My Commission Expires: May 31, 1925.

State of Arizona,
County of Maricopa—ss.

On this 9th day of June, A. D. 1924, before me personally appeared James Q. Wallace and Grace V. Wallace, his wife, known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed

the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this the 9th day of June, 1924.

[Seal] (Sgd.) M. J. DAUGHERTY,

Notary Public.

My Commission Expires: February 25th, 1928.

[65]

EXHIBIT J

CERTIFICATE OF ATTORNEY GENERAL OF THE STATE OF NEW MEXICO

I, Frank H. Patton, hereby certify that I am the duly elected, qualified and acting Attorney General of the State of New Mexico; that securities attached hereto amounting to $32,000.00 on the SE¼ of Section 19, Township 1, of Range 6 East of the Gila and Salt River Base and Meridian, were deposited with the Department of Insurance of the State of New Mexico in compliance with the law of this State, to-wit:

> Section 38, Chapter 48, Laws of 1909 and Section 71-155 of New Mexico Statutes Annotated, 1929 Compilation by the Mississippi Valley Life Insurance Company;

that said Department of Insurance of the State of New Mexico is still holding said securities for the benefit of registered policy holders, and the same have not been recorded or released by me.

Dated this the 13th day of February, A. D. 1935, at Santa Fe, Santa Fe County, New Mexico.

(Sgd.) FRANK H. PATTON,
Attorney General.

State of New Mexico,
County of Santa Fe.

Before me, the undersigned, a Notary Public in and for the County of Santa Fe, State of New Mexico, on this day personally appeared Frank H. Patton, Attorney General of the State of New Mexico, known to me to be the person whose name is subscribed to the foregoing instrument, and he acknowledged to me that he executed the same for the purposes and consideration therein expressed; and being duly sworn did say that the matters and things in the foregoing certificate are true.

Given under my hand and seal of office, this 18th day of February, A. D. 1935.

[Seal] (Sgd.) HELEN CLANCY,
Notary Public in and for Santa Fe County, New Mexico.

My Commission Expires: 12-27-36. [66]

ASSIGNMENT OF SECURITIES

Whereas The National Life Insurance Company of the Southwest, of Albuquerque, New Mexico, a life insurance company organized and doing business in this State, has registered its policies with the Insurance Department and has deposited with

such Department approved securities to an amount of not less than the net value of all policies so registered; and whereas such securities, while so on deposit, and the proceeds thereof, may be used by the State of New Mexico for the purpose of fully protecting any and all holders of policies so registered, and all obligations to the State in this connection.

Therefore, said Company by its successor, Mississippi Valley Life Insurance Company of Madison, Madison Co., Illinois, first party, hereby and herewith, in consideration of the foregoing, sells, assigns, and transfers to the State of New Mexico, second party, all the right, title, and interest of first party in and to the securities enclosed herewith, described as follows, to-wit:

No.	Name	Amount	Date Due
40	Mrs. James Q. Wallace Admx. of Estate of James Q. Wallace	$32,000.00	1/16/31

Said second party to have and to hold said securities for the purpose of satisfying just claims of any policy holder in case of possible default of said first party in the matter of satisfying the same, and for all the purposes hereinbefore mentioned.

Whenever, in the opinion of the State Bank Examiner, it may be proper or necessary for said Company to withdraw any or all of said securities from deposit, he may permit such withdrawal executing an assignment back to said first party

in the name of the State by the State Bank Examiner.

Whenever, in the opinion of the State Bank Examiner, any security or securities are about to become barred by statute, doubtful as to sufficiency or other reason, the State Bank Examiner, by letter, may tender back to said first party such security or securities, whereupon it shall be necessary for first party to furnish forthwith other or additional approved security in lieu of all such securities so tendered back.

In witness whereof, said first party has officially signed and affixed its seal in duplicate this 18th day of March, 1929.

[Seal] MISSISSIPPI VALLEY LIFE INSURANCE COMPANY,

By (Sgd.) J. N. MITCHELL,

Vice-President.

Attest:

(Sgd.) H. O. JAMES,

Asst. Secretary. [67]

EXHIBIT K

AGREEMENT BETWEEN REPUBLIC LIFE INSURANCE COMPANY AND RECEIVERS OF THE MISSISSIPPI VALLEY LIFE INSURANCE COMPANY.

This Agreement, made and entered into this 18th day of May, 1932, by and between Republic Life

Insurance Company of Dallas, Texas, party of the first part, and Joseph B. Thompson and William E. Caulfield, Receiver of the Mississippi Valley Life Insurance Company, a corporation, appointed by the Circuit Court of the City of St. Louis, Missouri, and Alvin S. Keys, Receiver of the said Mississippi Valley Life Insurance Company, under authority of the Circuit Court of Sangamon County, Illinois, parties of the second part,

Witnesseth:

1. Party of the first part agrees to assume as herein set out liability to insured and/or beneficiary on all policies known as ordinary life policies from and after noon central standard time May 16, 1932, issued by the Two Republics Life Insurance Company or National Life Insurance Company of the Southwest, and assumed by said Mississippi Valley Life Insurance Company, on which there are at said time no claims by death or disability and on which there is no default in premium prior to April 1, 1932, and on all ordinary life policies issued by said Mississippi Valley Life Insurance Company direct on which there are at said time no claims by death or disability and on which there is no default in premium prior to April 1, 1932.

2. Party of the first part shall be subrogated to the claims under all policies against the estate of Mississippi Valley Life Insurance Company on which the policy holders accept this assumption of insurance and may file a claim therefor in the re-

ceivership in the Circuit Court of Sangamon County, Illinois, transferred from the Circuit Court of Madison County, Illinois, and in the Circuit Court of the City of St. Louis, Missouri, and shall apply any sums received under such claims to the benefit of any such policy holder in the form of reduction of the amount of lien hereinafter provided for against such policies.

3. As part of the consideration for this contract there shall be established and placed aaginst each policy on which liability is assumed hereunder by party of the first part, a lien equal to 100% of the legal reserve thereon on the basis established and carried on the books and records of said Mississippi Valley Life Insurance Company, on the date to which premium has been paid to said Mississippi Valley Life Insurance Company, plus mortality rate from May 16, 1932, to date such premium is paid, such lien to bear interest at the rate of 6% per annum compounded annually, to be treated as a policy loan. Both lien and interest shall be deducted from any payment made by party of the first part and from any settlement thereunder or from the value used to purchase any paid-up or continued insurance.

On all policies which are secured by deposit with the Insurance Department of the State of New Mexico, the party of the first part shall be entitled to receive from said Insurance Department of the State of New Mexico, securities now on deposit to

the value of the reserve of the policies on which said party of the first part assumes liability hereunder and the policy holders accept such assumption, and said party of the first part shall, with the consent of the Insurance Department of the State of New Mexico, be entitled to have said reserves credited to it in such manner as the Insurance Department of the State of New Mexico shall approve, and said Alvin S. Keys, Receiver, shall be entitled to the reserves on deposit with the said Insurance Department of [68] the State of New Mexico, in excess of the claims which are against the said deposits. The lien on any such policy shall be reduced by the amount credited to or received by, said party of the first part from said deposit with said Insurance Department of the State of New Mexico on account thereof.

4. Party of the first part agrees that it will offer to the holder of any such policy term insurance at net cost to the extent of such lien so that each such policy holder may by carrying term insurance make available the full face of said policy in case of death.

5. The reinsurance and assumption of obligations herein provided for are further subject to the conditions, limitations and agreement that for a period of five years from the date as of which this contract becomes effective cash loans, except that part of the loan value that is applied to the payment of premiums on the policy, on which the loan

is made, and cash surrender values, shall not be available to such policy holders.

6. Party of the first part assumes no liability of any nature, on any claim on the policies herein reinsured, which shall originate prior to noon, central standard time, May 16th, 1932.

7. Said Jos. E. Thompson and William E. Caulfield, Receivers, parties of the second part agree to transfer and deliver to said party of the first part all cards, files, records and cabinets containing same pertaining to said policies, and mechanical equipment necessary for the keeping thereof, now in St. Louis, Missouri, as designated heretofore by list given said Thompson and Caulfield, Receivers, and said party of the first part agrees to pay said Thompson and Caulfield, Receivers, a sum to be fixed by the Circuit Court of the City of St. Louis, as the value thereof.

8. The holder of any such policies now defaulted for nonpayment of premium may within one year after said default, subject to lien of proper amount of reserve, upon evidence satisfactory to said party of the first part, of the health and insurability of the insured have said party of the first part assume liability on such policy from the date of reinstatement forward, provided on policies where default is not prior to April 1, 1932, insurance will attach from May 16, 1932, at noon, Central Standard Time, to be void unless premium be paid on or before June 15, 1932.

9. Party of the first part hereby constitutes the Superintendent of Insurance of the State of Missouri, its attorney in fact for it and in its name to accept service of process in any court in the State of Missouri, on account of any policy wherein the insured is now a resident of the State of Missouri, and constitutes the Director of Trade and Commerce of the State of Illinois its attorney in fact for it and in its name to accept service of process in any court in the State of Illinois on account of any policy wherein the insured is now a resident of the State of Illinois.

10. Party of the first part on or before August 31, 1932, agrees to furnish to parties of the second part a computation of the reserve on each policy on which it assumes liability hereunder as of April 25th, 1932, plus the proportionate part of any unexpired premium in order to furnish the amount of the claim under such policy and to furnish a separate computation with the same information on all policies for which it receives the cards, the holders of which do not accept or receive insurance under the terms hereof. [69]

11. Said parties of the second part shall at all reasonable times have access to any records received by party of the first part for any purpose necessary in the administration of said receiverships.

In Witness Whereof, said parties have executed these presents the year first above mentioned.

REPUBLIC LIFE
INSURANCE COMPANY,

By E. H. BANTA,
Vice-President.

Attest:

CLARENCE SIBLEY,
Secretary.

JOS. B. THOMPSON,
WILLIAM E. CAULFIELD,
Receivers, Mississippi Valley Life Insurance Company, Circuit Court, City of St. Louis, Missouri.

ALVIN S. KEYS,
Receiver, Mississippi Valley Life Insurance Company, Circuit Court of Sangamon County, Illinois, by transfer from Circuit Court of Madison County, Illinois.

[Endorsed]: Filed June 11, 1938. [70]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS, REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, A CORPORATION, J. G. VAUGHAN, M. J. DOUGHERTY, TO DISMISS PLAINTIFF'S FIRST AMENDED BILL OF COMPLAINT.

Come, Now, Defendants Republic Life Insurance Company of Dallas, Texas, a corporation, J. G. Vaughan and M. J. Dougherty and move the Court to dismiss plaintiff's First Amended Bill of Complaint filed herein upon the following grounds and for the following reasons:

Answering defendants move to dismiss said First Amended Bill of Complaint upon the ground and for the reason that it shows upon the face thereof that the plaintiff has not legal capacity to sue.

Answering defendants move the Court to dismiss said First Amended Bill of Complaint upon the ground and for the reason that said Bill of Complaint does not state facts sufficient to constitute a cause of action against answering defendants, or any of them, for the following reasons:

First, that said Bill of Complaint does not state facts sufficient to constitute a cause of action against answering defendants for the reason that said Bill of Complaint does not allege any amount due to the policy holders for whose benefit and security the alleged securities mentioned in the Complaint were deposited

with the Superintendent of [71] Insurance of the State of New Mexico, or any amount sought to be recovered and for the payment of which the alleged securities are sought to be foreclosed.

Second, that said Bill of Complaint does not state facts sufficient to constitute a cause of action against answering defendants for the reason that said Complaint does not show any lawful right or ownership in the plaintiff to the alleged securities, or lien sued on and sought to be foreclosed, or right or authority to maintain any action against said defendants, or any of them, for recovery thereunder or foreclosure thereof.

Third, that said Bill of Complaint does not state facts sufficient to constitute a cause of action against answering defendants for the reason that it shows upon the face of said complaint that the alleged securities sued on and sought to be foreclosed do not constitute an equitable lien, or mortgage, or any lien or mortgage, against the property described in the complaint and against which said securities are sought to be foreclosed.

Answering defendants move the Court for an order dismissing plaintiff's First Amended Bill of Complaint upon the ground and for the reason that the assignments of securities described in the Complaint and the instruments creating the alleged in-

debtedness sued on were executed without the State of Arizona, and that if plaintiff, or the Superintendent of Insurance of the State of New Mexico, or the State of New Mexico, or any one, ever had any right to sue on and enforce or foreclose the same, such right was, at the time of the filing of the Bill of Complaint herein, and is now, barred by the provisions of Subd. 3, Paragraph 2061, Revised Code of Arizona, 1928. [72]

Wherefore, Answering defendants pray that said complaint be dismissed as to said defendants and for costs.

G. W. SILVERTHORNE,
KENT SILVERTHORNE,
Address:
Suite 311 Phoenix Nat'l.
Bank Bldg., Phoenix, Arizona.

[Endorsed]: Filed Jul. 14, 1938. [73]

[Title of District Court and Cause.]

ANSWER OF R. L. DANIEL

Comes now R. L. Daniel, Life Insurance Commissioner of the State of Texas and says that he holds title to certain lands described in Plaintiff's original petition in this cause in trust for the protection of the policy holders and creditors of Republic National Life Insurance Company of Dallas, Texas, in accordance with the provisions of

Article 4740 Texas Revised Civil Statutes, which is herein set forth as follows for ready reference:

> "Any life insurance company now or which may hereafter be incorporated under the laws of this State may deposit with the Commissioner for the common benefit of all the holders of its policies and annuity bonds, securities of the kinds in which, by the laws of this State, it is permitted to invest or loan its funds, equal to the legal reserve on all its outstanding policies in force, which securities shall be held by said Commissioner in trust for the purpose and objects herein specified. Any such company may deposit lawful money of the United States in lieu of the securities above referred to, or any portion thereof, and may also, for the purposes of such deposit, convey to said Commissioner in trust the real estate in which any portion of its said reserve may be lawfully invested. In such case, said [74] Commissioner shall hold the title thereto in trust until other securities in lieu thereof shall be deposited with him, whereupon he shall reconvey the same to such company. Said Commissioner may cause any such securities or real estate to be appraised and valued prior to their being deposited with, or convey to, him in trust as aforesaid, the reasonable expense of such appraisement or valuation to be paid by the company."

Said R. L. Daniel says that he has no other or further interest in said lands and that his above described interest therein is fully represented by the interest of Republic National Life Insurance Company, the principal Defendant herein, is as much as said Republic National Life Insurance Company is under legal obligation to maintain the value of its deposits as required by the laws of this State and it is not the responsibility of this Defendant to answer for said Company.

WILLIAM McCRAW,
Attorney General of Texas.
RICHARD BROOKS,
Assistant Attorney General.

[Endorsed]: Filed Jul. 9, 1938. [75]

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED BILL OF COMPLAINT.

Comes now, the defendant, Grace V. Wallace Rowell, for herself and as guardian ad litem of William H. Wallace, and Anna Louise Wallace, Minors, and making answer to the first amended bill of complaint, admits, denies and alleges as follows:

I.

Answering Paragraphs I, II, III, IV, V, VI, VIII, X, XII, XIII, XV, XVI, XIX, XX, XXII,

XXIII, XXIV, and the first, second and third Paragraphs XVII, this defendant not having sufficient knowledge or information to either affirm or deny the matters and things set up in said enumerated paragraphs, denies categorically each, every, all and singular the allegations contained in said above enumerated paragraphs, and demand strict proof thereof.

This defendant, however, admits that she and the minor children are each citizens of the State of Arizona, and reside in the County of Maricopa, State of Arizona, as alleged in Paragraph I of the Amended Complaint. [78]

II.

Answering Paragraph VII these defendants admit the allegations of said Paragraph VII.

III.

Answering Paragraph IX, these defendants admit the allegations of said Paragraph IX.

IV.

Answering Paragraph XI, these defendants admit that Exhibit "I" mentioned in said Paragraph XI, was duly signed and executed by the defendant, Grace V. Wallace and her husband, James Q. Wallace, now deceased; as to the remainder and balance of the matters and things set up in and alleged in said Paragraph XI, these defendants not having sufficient knowledge or information to

either affirm or deny the remaining matters set up in said Paragraph XI, for the purpose of this answer deny categorically each, every, all and singular, the allegations in said Paragraph XI contained.

V.

Answering Paragraph XIV, these defendants admit that in the month of July, 1928, James Q. Wallace died, and that Grace V. Wallace was appointed and qualified as Administratrix of the Estate of James Q. Wallace; and that the Mississippi Valley Life Insurance Company agreed with the said Grace V. Wallace, Administratrix, to continue and keep the said executory contract alive in the name and right of said administratrix, and that said contract was extended for a period of two years after January 16, 1931; and these defendants allege that there was paid upon said contract the sum of One Thousand Dollars ($1,000.00) in the year 1924, and the sum of One Thousand Dollars ($1,000.00) in the year 1925; as to the remaining allegations in said Paragraph XIV not specifically answered herein, these defendants not having sufficient knowledge or information to either affirm or deny said [79] unanswered portions of Paragraph XIV, for the purpose of this Answer categorically deny each, every, all and singular, the allegations in said Paragraph XIV contained, to which a specific answer has not already been made, and demand strict proof thereof.

VI.

Answering the unanswered portion, same being the last paragraph in the numbered Paragraph XVII of the bill of complaint, these defendants admit all of said allegations, excepting only that portion that alleges that the defendant Grace V. Wallace Rowell did not sell the interest of the estate or of the minor children, William H. Wallace and Anna Louise Wallace, and in that respect alleges; that all interest in said property on the part of these defendants was contemplated to be sold and disposed of by the transaction made between the defendant, Grace V. Rowell and Republic Life Insurance Company.

VII.

Answering Paragraph XVIII, these defendants not having knowledge or information as to the matters and things set out therein as to Exhibit "K", or the other allegations in said Paragraph XVIII, to either affirm or deny the allegations of said Paragraph XVIII, for the purpose of this answer, categorically deny each, every, all and singular, generally and specially, the allegations set forth in Paragraph XVIII of the Amended Bill of Complaint.

VIII.

Answering Paragraph XXI, this defendant for herself and minor children, alleges that she has no knowledge of any interest in said property belonging to herself or the minor children, or any knowledge of any right that may accrue to her or the

minor children, the defendant admitting that her husband, F. D. Rowell, had no interest in said property, and this defendant alleges that if upon the hearing of this action, it is determined by the Court that some right, title or interest remains in this defendant, Grace [80] V. Rowell, or the minor children for whom she acts as guardian ad litem, that such rights be, by the Court established and secured.

IX.

Answering Paragraph XXV, these defendants admit that from the allegations in said complaint, same is a matter based in equity.

Wherefore, having fully answered, this defendant for herself, and as guardian ad litem for William H. Wallace and Anna Louise Wallace, minor children, prays for such relief as may be by the Court determined upon the trial of the issued herein, and if any rights accrue to this defendant, or to the minor children, that same be established and secured by the Court.

HERMAN LEWKOWITZ,
Attorney for Defendants,
Grace V. Wallace Rowell;
and Grace V. Wallace Rowell as Guardian Ad Litem for the minor children, William H. Wallace, and Anna Louise Wallace. [81]

State of Arizona,
County of Maricopa—ss.

Grace V. Wallace Rowell, being on oath first duly sworn deposes and says:

That she is one of the defendants named in the foregoing and entitled actions, and appears in this action as Guardian Ad Litem for the minor children, William H. Wallace, and Anna Louise Wallace, and makes this affidavit on behalf of herself and as guardian ad litem; that she has read the amended bill of complaint, and this answer; and as to the matters and things alleged in the bill of complaint and denied in this answer, this answer is true; as to the matters and things plead in this answer on information and belief, affiant believes them true.

GRACE V. WALLACE ROWELL.

Subscribed and sworn to before me this 23rd day of September, 1938.

[Seal] HERMAN LEWKOWITZ,
Notary Public.

My Commission expires: July 24, 1941.

Copy of the within instrument mailed this 23rd day of September, 1938, to the attorney for plaintiff.

HERMAN LEWKOWITZ,
Attorney for defendants, Grace Wallace Rowell and Grace Wallace Rowell, Guardian ad litem.

[Endorsed]: Filed Sep. 24, 1938. [82]

In the United States District Court
for the District of Arizona

October 1938 Term At Phoenix

Minute Entry of
FRIDAY, MARCH 24, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, Presiding

E-361

JOHN T. WATSON, Liquidating Receiver of and for the Superintendent of Insurance of State of New Mexico,

Plaintiff,

vs.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, a corporation, et al,

Defendants.

It Is Ordered that form of judgment for the defendants, approved as to form by counsel for the plaintiff, be entered and spread upon the minutes as the judgment in this case, as follows:

E-361

JOHN T. WATSON, Liquidating Receiver of and for the Superintendent of Insurance of State of New Mexico,

Complainant,

vs.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, a corporation, et al,

Defendants.

JUDGMENT

Honorable Dave W. Ling,
United States District Judge, Presiding.

The defendants, Republic Life Insurance Company of Dallas, Texas, a corporation, J. G. Vaughan and M. J. Dougherty, through their attorneys, G. W. Silverthorne and Kent Silverthorne, having filed herein their motion to dismiss the complainant's first amended bill of complaint and the same having been presented to the Court and submitted, and briefs having been filed on behalf of complainant and said defendants, and the Court having taken the matter under advisement and having considered the same, and the Court, being fully advised and having on the 1st day of March, 1939 made and entered its order herein that said motion to dismiss said first amended bill of complaint be granted, and that the case be dismissed, [84]

Now, Therefore, It Is By the Court Ordered, Adjudged and Decreed: That the motion of Republic Life Insurance Company of Dallas, Texas, a corporation, J. G. Vaughan and M. J. Dougherty to dismiss complainant's first amended bill of complaint be, and the same is hereby granted, and that the above-entitled suit be, and the same is hereby, dismissed, and that said defendants have and recover their costs herein incurred and taxed in the sum of $.....

Approved As to Form March 22, 1939.
FRED C. KNOLLENBERG [85]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that John T. Watson, Liquidating Receiver, plaintiff in the above entitled action, appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment of the District Court of the United States in and for the District of Arizona, made and entered on the twenty-fourth day of March, A. D. 1939, in said cause, adjudging that plaintiff take nothing by his action, and dismissing the complaint in said cause of action, and granting judgment for costs in favor of the defendants, Republic Life Insurance Company of Dallas, Texas, J. G. Vaughan and M. J. Dougherty, and from the whole thereof.

WILSON AND WATSON,
Post Office address:
Sena Plaza, Santa Fe, N. M.;
By FRED C. KNOLLENBERG
FRED C. KNOLLENBERG
Post Office Address:
415 Caples Bldg.,
El Paso, Texas.

[Endorsed]: Filed Jun. 22, 1939. [86]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents: That we, John T. Watson, Liquidating Receiver, as Prin-

cipal, and American Employers' Insurance Company, a corporation, as Sureties, are held and firmly bound unto the defendants, Republic Life Insurance Company of Dallas, Texas, a corporation, H. B. Hershey, Receiver of Mississippi Valley Life Insurance Company, under appointment by the Circuit Court of Sangamon County, Illinois; and R. E. O'Malley and William E. Caulfield, Receivers of said Mississippi Valley Life Insurance Company, under appointment by the Circuit Court of the City of St. Louis, Missouri; J. G. Vaughan, M. J. Dougherty, Grace V. Rowell, formerly Grace V. Wallace, William H. Wallace, a minor, Anna Louise Wallace, a minor, R. L. Daniel, Chairman of the Board of the Insurance Commission of the State of Texas, in the full and just sum of Two Hundred Fifty and No/100 Dollars ($250.00), to be paid to the said defendants, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, to secure the payment of the costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified.

Sealed with our seals, and dated this 22nd day of June in the Year of Our Lord One Thousand Nine Hundred Thirty-nine.

Whereas, lately, in the District Court of the United States in and for the District of Arizona, in a suit pending in said court between John T.

Watson, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico, [87] Complainant, and Republic Life Insurance Company of Dallas, Texas, a corporation, H. B. Hershey, Receiver of Mississippi Valley Life Insurance Company, under appointment by the Circuit Court of Sangamon County, Illinois, and R. E. O'Malley and William E. Caulfield, Receivers of said Mississippi Valley Life Insurance Company, under appointment by the Circuit Court of the City of St. Louis, Missouri, J. G. Vaughan, M. J. Dougherty, Grace V. Rowell, formerly Grace V. Wallace, William H. Wallace, a minor, Anna Louise Wallace, a minor, R. L. Daniel, Chairman of the Board of the Insurance Commission of the State of Texas, Defendants, a decree was rendered against the said John T. Watson, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico, on the twenty-fourth day of March, A. D. 1939, dismissing complainant's first amended bill of complaint, upon the motion of the defendants, and the said complainant, after having given notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such that if the said John T. Watson, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico, shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above

obligation to be void, else to remain in full force and virtue.

JOHN T. WATSON
Complainant.

[Seal] AMERICAN EMPLOYERS' INSURANCE COMPANY
Surety.

By R. L. CHARLES
Its attorney in fact.

.....
Surety.

[Endorsed]: Filed Jun. 22, 1939. [88]

[Title of District Court.]

United States of America
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of John T. Watson, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico, Plaintiff, versus Republic Life Insurance Company of Dallas, Texas, a corporation, et al, Defendants, numbered E-361 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 93, inclusive, contain a full, true and correct transcript of the proceedings of said cause

and all the papers filed therein, called for and designated in Plaintiff's Designation and Supplemental Designation of Contents of Record on Appeal filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $21.30 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 25th day of July, 1939.

[Seal] EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS
Chief Deputy Clerk [93]

[Endorsed]: No. 9243. United States Circuit Court of Appeals for the Ninth Circuit. John T. Watson, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico, Appellant, vs. Republic Life Insurance Company of Dallas, Texas, a corporation, H. B. Hershey, Receiver of Mississippi Valley Life Insurance Company, R. E. O'Malley and William E. Caulfield, Receivers, J. G. Vaughan, M. J. Dougherty, Grace V. Rowell formerly Grace V. Wallace, William H. Wallace, a minor, Anna Louise Wallace, a minor R. L. Daniel, Chairman of the Board of the Insur-

ance Commission of the State of Texas, Appellees. Transcript of Record upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 27, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the District Court of the United States
in and for the District of Arizona

#9243

In Equity—No. E-361

JOHN T. WATSON, Liquidating Receiver of and for the Superintendent of Insurance of State of New Mexico,

Complainant,

v.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, a corporation, et al,

Defendants.

POINTS RELIED UPON FOR REVERSAL AND RECORD NECESSARY TO PROVE SAME.

To the Honorable Clerk of the United States Circuit Court of Appeals, San Francisco, California:

In compliance with Subdivision Six of Rule 19 of the United States Circuit Court of Appeals for

the Ninth Circuit, appellant says that the United States District Court sustained a motion to strike, and that by virtue thereof the points or propositions of law upon which he intends to rely upon the appeal in this case are the ones raised by the defendants in their motion to strike, as follows:

1. That plaintiff does have legal capacity to bring this suit.

2. That the first amended bill of complaint does state facts sufficient to constitute a cause of action against the defendants.

3. That it is not necessary to allege any amount due the policyholders for whose benefit and security the securities mentioned in the first amended bill of complaint were deposited, but the allegations therein made are sufficient to constitute a cause of action.

4. That the first amended bill of complaint does state facts sufficient to show lawful right or ownership in the plaintiff to the securities and liens sued on and sought to be foreclosed.

5. That plaintiff does have right and authority to maintain the action against the defendants for the recovery on said lien and the foreclosure thereof.

6. That the security sued on and for which foreclosure is asked does constitute an equitable lien or mortgage against the property described in the first amended bill of complaint, and should have been foreclosed.

7. That the claim of plaintiff is not barred by the provisions of subdivision three, paragraph 2061, Revised Code of Arizona, 1898.

That appellant considers the following parts of the record necessary for the consideration of the points above raised, to-wit:

1. Petition for leave to sue, and order granting leave.
2. First amended bill of complaint.
3. Motion to dismiss first amended bill of complaint.
4. Separate answer of J. G. Vaughan.
5. Answer of H. B. Hershey, Receiver of Mississippi Valley Life Insurance Company.
6. Answer of Grace V. Rowell.
7. Answer of R. L. Daniel, Chairman of the Board of Insurance Commissioners of the State of Texas.
8. The Judgment.

That he is mailing a copy hereof to the following attorneys, who represent defendants:

Herman Lewkowitz, Esq., First National Bank of Arizona Building, Phoenix, Arizona;

Darrell R. Parker, Esq., Mesa, Arizona;

Charles E. Bliss, Esq., 515 South Grand Avenue, East, Springfield, Illinois;

Cecil A. Morgan, Esq., First National Bank Building, Fort Worth, Texas;

William McCraw, Esq., Attorney General of Texas, Austin, Texas.

Appellant shows that a copy of the above is served upon Silverthorne and Silverthorne, as per their receipt hereto attached.

Wherefore, the court having sustained the demurrer, committed error as on the propositions above set forth, and upon hearing appellant asks that the judgment of the trial court be reversed.

WILSON & WATSON,
Post Office Address:
Sena Plaza,
Santa Fe, New Mexico,
By FRED C. KNOLLENBERG
FRED C. KNOLLENBERG
Post Office Address:
415 Caples Bldg.,
El Paso, Texas.

We, the undersigned, attorneys for certain defendants who filed the Motion to Dismiss, do hereby acknowledge receipt of a copy of the foregoing points or propositions of law and the request for parts of the record to sustain the appeal.

SILVERTHORNE & SILVERTHORNE

[Endorsed]: Filed July 27, 1939. Paul P. O'Brien, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 9243.

JOHN T. WATSON, LIQUIDATING RECEIVER OF AND FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW MEXICO, APPELLANT,

VS.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, A CORPORATION, H. B. HERSHEY, RECEIVER OF MISSISSIPPI VALLEY LIFE INSURANCE COMPANY, R. E. O'MALLEY AND WILLIAM E. CAULFIELD, RECEIVERS, J. G. VAUGHAN, M. J. DOUGHERTY, GRACE V. ROWELL, FORMERLY GRACE V. WALLACE, WILLIAM H. WALLACE, A MINOR, ANNA LOUISE WALLACE, A MINOR, R. L. DANIEL, CHAIRMAN OF THE BOARD OF THE INSURANCE COMMISSION OF THE STATE OF TEXAS, APPELLEES.

APPELLANT'S BRIEF.

FRANCIS C. WILSON,
Post-Office Address:
Sena Plaza, Santa Fe, New Mexico,
JOHN C. WATSON,
Post-Office Address:
Sena Plaza, Santa Fe, New Mexico,
FRED C. KNOLLENBERG,
Post-Office Address:
415 Caples Building, El Paso, Texas,
Attorneys for Appellant.

SUBJECT INDEX

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UNITED STATES CIRCUIT COURT OF APPEALS

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VS.

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APPELLANT'S BRIEF.

To the Chief Justice and Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the appellant, John T. Watson, liquidating receiver of and for the superintendent of insurance of the State of New Mexico, and respectfully requests this court to review the decision of the District Court of the United States for the District of Arizona, rendered on March twenty-fourth, 1939, in cause No. E-361 on the docket of said court, wherein your appellant was plaintiff and Republic Life Insurance Company of Dallas, Texas, a corporation, H. B. Hershey, receiver of Mis-

sissippi Valley Life Insurance Company, R. E. O'Malley and William E. Caulfield, receivers, J. G. Vaughan, M. J. Dougherty, Grace V. Rowell, formerly Grace V. Wallace, William H. Wallace, a minor, Anna Louise Wallace, a minor, R. L. Daniel, chairman of the Board of the Insurance Commission of the State of Texas, were defendants. The court rendering judgment, sustaining the motion to dismiss filed by Republic Life Insurance Company of Dallas, Texas, J. G. Vaughan and M. J. Dougherty (Tr. p. 95). Appellant gave notice of appeal (Tr. p. 96) to this court and filed an appeal bond on June 22, 1939 (Tr. p. 96).

JURISDICTION OF THIS COURT.

This is a suit in equity wherein the matter in controversy exceeds, exclusive of interest and costs, $3,000.00, being a foreclosure of an equitable lien of $32,000.00 (Tr. pp. 25 and 46), and arises and exists between citizens of different states (Tr. pp. 25-28) (28 U. S. C. A., Sec. 41) and the right of review of the decision is given this court by 28 U. S. C. A., Section 225, as amended, and we sought to follow Rule 73, New Rules of Civil Procedure, as to the appeal.

STATEMENT OF PLEADINGS AND FACTS.

Defendants, Republic Life Insurance Company, J. G. Vaughan, and M. J. Dougherty, having filed their motion to dismiss the bill on the following grounds (Tr. pp. 84, 85) (in short):

(a) The complaint does not show plaintiff has legal capacity to sue.

(b) That the bill of complaint does not state facts sufficient to constitute a cause of action against these defendants, for the following reasons:

1. That the complaint does not allege amount due policyholders, for whose benefit and security the alleged securities mentioned in the complaint were deposited.

2. That the complaint does not show any lawful right or ownership in the plaintiff to the alleged securities or lien sued on and sought to be foreclosed.

3. That it shows upon the face of the complaint that the alleged securities sued on and sought to be foreclosed did not constitute an equitable lien or mortgage, or any lien or mortgage against the property described.

(c) That the assignments of securities described in the complaint and the instruments creating the alleged indebtedness were executed without the State of Arizona, and if the plaintiff, the superintendent of insurance of the State of New Mexico, or the State of New Mexico, or anyone, ever had any right to sue or foreclose, it is now barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928.

This raising strictly questions of law, it is fundamental that the motion admits as true all matters alleged in the complaint, and this raises practically three questions:

First. Has plaintiff the legal capacity and the right to sue?

Second. Does the amended bill state a cause of action?

Third. Is it barred by Subdivision 3, Paragraph 2061, of the Revised Code of Arizona, 1928?

Plaintiff filed his original complaint March 22, 1937, and the first amended bill of complaint was filed June 11, 1938 (Tr. pp. 25-83). Plaintiff pleaded that he is a citizen and resident of the city and County of Santa Fe, State of New Mexico, and duly qualified and acting liquidating receiver of and for the superintendent of insurance of the State of New Mexico, with respect to the assets in and belonging to a fund deposited with the superintendent of insurance pursuant to and in compliance with Section 38 of Chapter 48 of the laws of the then territory of New Mexico, enacted in the year 1909 (see Exhibit A, Tr. p. 48), which fund was created and stands under the law as security for full legal reserve of policies registered thereunder and issued by the National Life Insurance Company of the Southwest, which said policies were assumed successively by Two Republics Life Insurance Company and Mississippi Valley Life Insurance Company, an Illinois corporation, and the appellant is acting pursuant to appointment by the District Court of the County of Santa Fe, New Mexico, a court having general jurisdiction in law and in equity, and brings this suit under the authority of an order of court, a true copy of which is attached and marked Exhibit B (Tr. p. 50), and also under authority of an assignment by George M. Biel, the superintendent of insurance, a copy of which is attached, marked Exhibit C (Tr. pp. 51-53).

The purpose of this suit is to liquidate the security, which is in the nature of a real estate mortgage on lands within the jurisdiction of the district court.

That Republic Life Insurance Company of Dallas, Texas, is an insurance company organized as a corporation under the laws of the State of Texas, having its principal office and place of business in Dallas, Texas,

and is a citizen and resident of said state; H. B. Hershey is receiver of the Mississippi Valley Life Insurance Company and is a resident and citizen of the State of Illinois; and J. G. Vaughan is a citizen and resident of the State of Texas, residing in Dallas; the defendants, M. J. Dougherty, Grace V. Rowell, William H. Wallace and Anna Louise Wallace, are all citizens of the State of Arizona; and the defendant, R. L. Daniel, is chairman of the Board of Insurance Commissioners of the State of Texas, and resides in Austin, Texas.

Paragraph IV (Tr. p. 29) pleads that the above Exhibit A was repealed in 1925 by the new Insurance Code, and became thereafter Section 71-155 of the New Mexico Statutes, Annotated, 1925, which is attached as Exhibit D (Tr. p. 54), at which time the superintendent of insurance was created and invested by statute with all the powers of state bank examiner, particularly enforcing Section 71-155.

Paragraph V (Tr. p. 30). That the National Life Insurance Company of the Southwest issued many registered policies.

Paragraph VI. That prior to the year 1923 the National Life Insurance Company transferred all of its assets and business to the Two Republics Life Insurance Company, a Texas corporation, which assumed all the outstanding policy obligations of the National Life Insurance Company.

Paragraph VII. That on January 16, 1923, the Two Republics Life Insurance Company, being then the owner in fee of the following property situated in the County of Maricopa, State of Arizona, to-wit:

> The Southeast Quarter (SE 1-4) of Section Nineteen (19), Township One (1) North of Range

Six (6) East of the Gila and Salt River Base and Meridian;

entered into a contract for the sale thereof to James Q. Wallace and Grace V. Wallace, husband and wife, contract being attached, marked Exhibit E (Tr. p. 55), in which the Wallaces, in addition to the sum paid upon the execution and delivery of the contracts, agreed to make further payments aggregating $32,255.00, which contract and a warranty deed were put in escrow with the Salt River Valley Trust & Savings Bank of Mesa, Arizona, along with other papers, as therein stated (Tr. p. 31).

Paragraph VIII. That on April 5, 1923, the Two Republics Life Insurance Company assigned said contract and securities, by written assignment marked Exhibit F (Tr. p. 62), to the state bank examiner, to secure the registered policies of the National Life Insurance Company of the Southwest, pursuant to the requirements of said Section 38 of Chapter 48 of the Laws of 1909.

Paragraph IX (Tr. p. 33). That on the 25th day of April, 1923, the Two Republics Life Insurance Company and the Wallaces modified Exhibit E by supplemental agreement attached to the complaint as Exhibit G (Tr. p. 65).

Paragraph X. That on July 27, 1923, Two Republics Life Insurance Company executed another assignment of securities, Exhibit H (Tr. p. 69), which confirmed the lien and fixed its amount of $32,255.00.

Paragraph XI. That on May 15, 1924, for the purposes of facilitating and making safer and more effective the lien, in compliance with the requirement of the state bank examiner, Exhibit E was modified by Exhibit I

(Tr. p. 71), by which Wallaces and the Two Republics Life Insurance Company agreed that all the escrow papers should be withdrawn from the Salt River Valley Trust & Savings Bank of Mesa, Arizona, and deposited with the state bank examiner, and consent of Wallaces was therein given for the deposit of the securities with the superintendent of insurance of the State of New Mexico (Tr. p. 34).

Paragraph XII. That on the 3d day of March, 1928, Two Republics Life Insurance Company transferred and sold all of its assets and business to Mississippi Valley Life Insurance Company, a corporation duly organized under the insurance laws of the State of Illinois, and they assumed all the liabilities and obligations of the Two Republics Life Insurance Company, including the registered policies of the National Life Insurance Company of the southwest, and a deed to said property was recorded in Book 223 of the Records of Deeds of Maricopa County, Arizona, at page 74, and which deed, after being recorded, the Mississippi Valley Life Insurance Company deposited with the superintendent of insurance of the State of New Mexico, to further evidence the lien effected by the escrow contract aforesaid.

Paragraph XIII (Tr. p. 35). That at the time of the transfer Wallaces' escrow contracts were held and listed by the superintendent of insurance as security for $32,255.00, all of which was well known to and understood by the said defendant, Mississippi Valley Life Insurance Company.

Paragraph XIV (Tr. p. 36). That in the month of July, 1928, James Q. Wallace died and Grace V. Wallace was appointed and qualified as the administratrix of the estate, and acquired said land, subject to the lien afore-

said, and elected and agreed to continue said contract and keep same alive, and it was thereafter extended by Grace V. Wallace and the Mississippi Valley Life Insurance Company for two years after January 6, 1931, and on March 18, 1929, the Mississippi Valley Life Insurance Company executed and delivered to the superintendent of insurance of New Mexico an assignment of security, referred to as Exhibit J (Tr. pp. 75-77), and confirmed and renewed the lien at $32,000.00.

Paragraph XV (Tr. p. 37). That on April 25, 1932, the Mississippi Valley Life Insurance Company became insolvent, and the affairs of the insolvent corporation were placed in the hands of the defendants, receivers hereinbefore named, for the purpose of liquidation by such receivers.

Paragraph XVI. That on May 18, 1932, the receivers of the Mississippi Valley Life Insurance Company entered into a contract (Exhibit K, Tr. pp. 77-83) with defendant, Republic Life Insurance Company of Dallas, Texas, by which the defendant agreed to assume policy obligations of the Mississippi Valley Life Insurance Company, including the registered policies issued by National Life Insurance Company of the Southwest, but charging against each policy so assumed a lien in the amount of the whole legal reserve; that said contract did not contemplate transfer of title to the lands above described, and there never was or has been any transfer of title to said lands except as hereinafter stated, and Republic Life Insurance Company entered into the contract with full knowledge that the superintendent of insurance had, was entitled to, and claimed a lien upon the land aforesaid in the amount and for the purposes aforesaid.

Paragraph XVII (Tr. p. 38). That on August 22, 1932, defendant Banta, claiming to be the owner of the lands

aforesaid by transfer of the escrow contract by the Republic Life Insurance Company, but who in fact had no legal or equitable title to said land or escrow contract, commenced a suit in the Superior Court of Maricopa County, Arizona, against A. O. Pelsue as receiver of the Mississippi Valley Life Insurance Company, appointed August 22, 1932, which suit resulted in a decree dated August 22, 1932, adjudging Banta to be the owner in fee simple of the lands, and ordering the said receiver Pelsue to execute to Banta a deed therefor, which said deed was recorded in the recorder's office of Maricopa County in Book 267 of Deeds, at pages 349 and 350; that Pelsue as such receiver did on August 22, 1932, execute a quit claim deed recorded in Book 267 of Deeds, at page 350; that on September 10, 1932, defendant, Republic Life Insurance Company of Dallas, Texas, executed and delivered to E. H. Banta a warranty deed conveying the lands aforesaid, which deed is of record in the office of the county clerk of Maricopa County, Arizona, in Book 267 of Deeds, at pages 550 and 551; and that the Republic Life Insurance Company on said date had and owned no title to said property. That on September 10, 1932, Grace V. Rowell, formerly Grace V. Wallace, delivered to said Banta a warranty deed purporting to convey the lands aforesaid, which deed is recorded in Book 267 of Deeds, at pages 536 and 537 thereof, and that said deed was delivered pursuant to a contract made on August 20, 1932, between Grace V. Rowell of one part and the defendant, Republic Life Insurance Company, of the other part, which recognized the escrow contract, but the said contract of sale or deed was not authorized by the court nor confirmed by the court as in the statutes in such cases made and provided, and did not sell and convey the interest of the minors, William H. Wallace and Anna Louise Wallace.

Paragraph XVIII (Tr. p. 40). That said E. H. Banta was on said date vice-president of the defendant, Republic Life Insurance Company of Dallas, Texas, and Banta personally negotiated with the receivers aforesaid the agreement (Exhibit K), brought the suit No. 37799 in the Superior Court of Maricopa County, Arizona, entitled *Banta* v. *Pelsue,* and made the contract with Grace V. Rowell, and had full knowledge and notice that the lands aforesaid were subject to the lien of the superintendent of insurance of the State of New Mexico, for security, as aforesaid, and the superintendent of insurance of New Mexico had no knowledge or notice of and was not made a party to any of the various transactions or the judgment aforesaid by which E. H. Banta procured for himself the various deeds to said land, and if said Banta did acquire legal title to said land, then such title is subject to the lien of the superintendent of insurance of the State of New Mexico.

Paragraph XIX (Tr. p. 40). That on March 13, 1933, E. H. Banta executed and delivered to the defendant, J. G. Vaughan, a warranty deed, recorded in Book 272 of Deeds, at page 478, and at that time J. G. Vaughan was an officer and employee of the Republic Life Insurance Company of Dallas, Texas, and had full knowledge and notice of the lien and right and claim of lien of the superintendent of insurance of the State of New Mexico, and that the defendant, J. G. Vaughan, took the title in trust for Republic Life Insurance Company of Dallas, Texas, and thereupon executed and delivered to the Republic Life Insurance Company of Dallas, Texas, a conveyance of said land, which has been and is now withheld from record, and the defendant, Republic Life Insurance Company, claims to own said land, and has since the filing of this suit, and after demand made by plaintiffs upon

them for possession, obtained from said J. G. Vaughan and his wife a deed to said land, which was filed for record in the records of deeds of Maricopa County, Arizona, on the 12th day of April, 1938; and thereafter the Republic Life Insurance Company transferred said property to R. L. Daniels, chairman of the Board of Insurance Commissioners of the State of Texas, which deed was filed for record April 12, 1938, and recorded in Book 321 of the Deed Records of Maricopa County, Arizona, at pages 317 and 318.

Paragraph XX (Tr. p. 42). That the defendant Dougherty has been in possession of the lands for the last three years, with full knowledge and notice of the lien and claim of the superintendent of insurance.

Paragraph XXI (Tr. p. 42). That Grace V. Rowell and her two children, William H. Wallace and Anna Louise Wallace, and R. L. Daniel, claim some interest in the property.

Paragraph XXII (Tr. p. 43). That the defendant, Republic Life Insurance Company, is not, and never has been, licensed or authorized to do business in the State of New Mexico, and has never submitted to the jurisdiction or authority of the superintendent of insurance since undertaking the risks and liabilities of the Mississippi Valley Life Insurance Company, including the registered policies issued by the National Life Insurance Company of the Southwest, nor have they complied or pretended to comply with the requirements of the New Mexico statutes, and that the superintendent of insurance has no power to require defendant, Republic Life Insurance Company of Dallas, Texas, to maintain a deposit for the statutory purposes aforesaid, but is compelled to rely upon the security in his hands at the date of the insolvency.

Paragraph XXIII (Tr. p. 44). The superintendent of insurance was not a party to either the aforesaid receivership proceedings in the State of Arizona entitled *Dougherty* v. *Mississippi Valley Life Insurance Company,* No. 37332, or the suit in Arizona entitled, *Banta* v. *Pelsue,* No. 37799, both on the docket of the Superior Court of Maricopa County, Arizona, and had no knowledge until November, 1935, that there had been an attempted surrender and merger of the interest of the Wallaces as vendees in said executory contract, nor of any other transactions hereinbefore set forth by means whereof said E. H. Banta and Republic Life Insurance Company of Dallas, Texas, intended and attempted to subvert, circumvent and defeat the lien aforesaid, all of which were concealed from said superintendent of insurance, and all of which proceedings were void upon their face and cannot and do not affect the lien or claim of this plaintiff.

Paragraph XXIV (Tr. p. 44). That appellant did by telegram, on the 17th day of March, 1937, and again on or about the 13th day of April, 1937, through his attorney, make a demand upon the Republic Life Insurance Company of Dallas, Texas, for an acknowledgment and payment of the lien and demand for possession of the property, and defendant did not reply to the first demand, and refused the second demand made for possession.

Paragraph XXV (Tr. p. 45). That as fully appears from the allegations foregoing, your appellant is without remedy in the premises except in a court of equity, and will suffer irreparable loss and injury unless afforded the relief prayed for, the prayer being (Tr. pp. 45-47), after a recital of the appearances: (2) That the court appoint a guardian *ad litem* to represent William W. Wallace and Anna Louise Wallace, and subpoena issue directed

to Grace V. Rowell and said guardian *ad litem* to appear and answer the allegations; (3) that process issue for service upon R. L. Daniel; (4) that after hearing herein the court render its decree, declaring and establishing a lien in the nature of a mortgage in favor of your orator upon the lands hereinbefore described and the appurtenances thereto, in the sum of $32,000.00, and declaring and establishing such lien to be superior and prior to any and all interest or claim of each and all of the defendants, such lien to be had and held by your orator as liquidating receiver as an asset of his said trust, and to be enforced, applied and distributed as a security deposited pursuant to the provisions of Section 38 of Chapter 48, of the Laws of New Mexico, for the year 1909, for security of the full legal reserve of policies of said National Life Insurance Company of the Southwest, issued and registered thereunder; (5) that your orator further prays that having declared and established a lien, the court further decree the amount thereof to be presently due and payable, and that unless the defendants or some of them pay off and satisfy the amount thereof within a time by such decree to be specified, your orator may and shall have foreclosure thereof, and that said lands be sold in the manner provided by law for foreclosure of liens on real estate, according to the rules and practice of this court, for satisfaction of the sum of $32,000.00; (6) that your orator further prays for such other, further or different relief in the premises as may appear meet and equitable.

H. B. Hershey, receiver of Mississippi Valley Life Insurance Company, who is the statutory receiver of Mississippi Valley Life Insurance Company, answered the complaint (Tr. p. 21), and admitted the allegations with

respect to the jurisdiction, and the following paragraphs of our complaint, admitting the following facts:

VII. That on January 16, 1923, the Two Republics Life Insurance Company was the owner in fee of the Southeast 1-4 of Section 19, and entered into a contract of sale with James Q. Wallace and Grace V. Wallace, being Exhibit E, and that the Wallaces, in addition to the sum paid upon the execution and delivery of the contract, agreed to make further payments aggregating $32,255.00, and that the contract and deed were put in escrow with the Salt River Valley Trust and Savings Bank of Mesa, Arizona.

VIII. That on April 5, 1923, Two Republics Life Insurance Company assigned said contract and securities by Exhibit F to the state bank examiner of New Mexico, to secure registered policies of the National Life Insurance Company of the Southwest.

IX. That on April 25, 1923, Wallaces and the Two Republics Life Insurance Company modified Exhibit A by a supplemental agreement attached to the complaint as Exhibit G.

X. That on July 27, 1923, Two Republics Life Insurance Company executed another assignment of securities, Exhibit H, confirming the lien, and fixed its amount at $32,255.00.

XI. That on May 15, 1924, for the purpose of facilitating and making safer and more effective the lien in compliance with the requirement of the state bank examiner, Exhibit E was modified by Exhibit I, by which Wallaces and Two Republics Life Insurance Company agreed that all escrow papers should be withdrawn from the Salt River Valley Trust & Savings Bank of Mesa,

Arizona, and deposited with the state bank examiner, and the consent of Wallaces was therein given for the deposit of the securities with the superintendent of insurance.

XII. That on March 3, 1928, Two Republics Life Insurance Company transferred and sold all of its assets and business to the Mississippi Valley Life Insurance Company, an Illinois corporation, which assumed all the liabilities and obligations of Two Republics Life Insurance Company, including the registered policies of the National Life Insurance Company of the Southwest, and the deed to said property was recorded in Book 223 of the Deed Records of Maricopa County, page 74, and after being recorded, the Mississippi Valley Life Insurance Company deposited that deed with the superintendent of insurance of the State of New Mexico, to evidence the lien effected by the escrow contract.

XIII. That at the time of the transfer Wallaces' escrow contracts were held and listed by the superintendent of insurance as security for $32,255.00, and that was well known and understood by the defendant, Mississippi Valley Life Insurance Company.

XIV. That in the month of July, 1928, James Q. Wallace died and Grace V. Wallace was appointed and qualified as administratrix of the estate and acquired said land subject to the lien aforesaid, and elected and agreed to continue the contract, to keep same alive, and it was thereafter extended by Grace V. Wallace and the Mississippi Valley Life Insurance Company for two years after January 6, 1931, and on March 18, 1929, the Mississippi Valley Life Insurance Company executed and delivered to the superintendent of insurance of New Mexico, an assignment of security, referred to as Exhibit J and confirmed and renewed the lien at $32,000.00.

XV. That on April 25, 1932, the Mississippi Valley Life Insurance Company became insolvent and the affairs of the insolvent corporation were placed in the hands of receivers, for the purpose of liquidation by such receivers.

This answer was signed and sworn to by H. B. Hershey (Tr. pp. 23, 24).

Defendant, R. L. Daniel, life insurance commissioner of the State of Texas, answering (Tr. p. 86), admits he holds title in trust but Republic National Life fully represents his interest.

Grace V. Rowell, answering for herself and as guardian *ad litem* of William H. Wallace and Anna Louise Wallace, minors (Tr. pp. 88-92), admits the following:

VII. That on January 16, 1923, the Two Republics Life Insurance Company was the owner in fee of the Southeast 1-4 of Section 19, and entered into a contract of sale with James Q. Wallace and Grace V. Wallace, being Exhibit E, and that the Wallaces, in addition to the sum paid upon the execution and delivery of the contract, agreed to make further payments aggregating $32,255.00, and that the contract and deed were put in escrow with the Salt River Valley Trust and Savings Bank of Mesa, Arizona.

IX. That on April 25, 1923, Wallaces and the Two Republics Life Insurance Company modified Exhibit A by a supplemental agreement attached to the complaint as Exhibit G.

XI. That she and her husband signed Exhibit I.

XIV. She admits (Tr. p. 90) James Q. Wallace died in July, 1928; that she was appointed and qualified as administratrix of the estate of James Q. Wallace; that the

Mississippi Valley Life Insurance Company agreed with her to continue and keep the executory contract alive in the name and right of the administratrix, and that said contract was extended for a period of two years after January 16, 1931, and that there was paid upon said contract $1,000.00 in 1924 and $1,000.00 in 1925.

XVII. She admits (Par. VI, p. 91) that on September 10, 1932, Grace V. Rowell, formerly Grace V. Wallace, and widow of James Q. Wallace, deceased, then wife of F. D. Rowell (joined *pro forma* by her husband), individually, and as administratrix of the estate of James Q. Wallace, deceased, executed and delivered to said Banta a warranty deed purporting to convey the lands aforesaid, which deed is recorded in the office of the county recorder of said County of Maricopa, State of Arizona, in Book 267 of Deeds, at pages 536-7 thereof; that said deed was delivered pursuant to a contract made on August 20, 1932, between said Grace V. Rowell of one part and defendant, Republic Life Insurance Company of the other part, which recognized the escrow contract, but the contract of sale or deed was not authorized by the court nor confirmed by the court, as in the statutes in such cases made and provided.

This answer was signed and sworn to by Grace V. Wallace Rowell (Tr. p. 93).

Three defendants, Republic Life Insurance Company of Dallas, Texas, J. G. Vaughan and M. J. Dougherty, filed the motion to dismiss (Tr. pp. 84-86) referred to above, which were argued and submitted on briefs, and after consideration Judge Ling sustained the motions, and on March 24, 1939, entered his judgment (Tr. p. 95):

> "That the motion of Republic Life Insurance Company of Dallas, Texas, a corporation, J. G.

Vaughan and M. J. Dougherty to dismiss complainant's first amended bill of complaint be, and the same is hereby granted, and that the above-entitled suit be, and the same is hereby, dismissed."

Notice of appeal and appeal bond were filed on June 22, 1939.

Points relied upon for reversal are set out on pages 102 and 103 of the transcript, which we desired to conform to Rule 19-6, and are but the affirmative of the points raised by the motion to dismiss, and these we arranged in the form of specification of errors, on account of the statement in Rule 20-2(d), which we hope meets requirements of the rules.

SPECIFICATION OF ERRORS.

First Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint shows upon its face that plaintiff has not legal capacity to sue (germane to point relied upon for reversal, No. 1, Tr. p. 102).

Second Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, because it does not allege any amount due the policyholders for whose benefit and security the alleged securities were deposited with the superintendent of insurance of the State of New Mexico, or any amount sought to be recovered (germane to Point 3, Tr. p. 102).

Third Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, for the reason that said complaint does not show any lawful right or ownership in the plaintiff to the alleged securities, or lien sued on and sought to be foreclosed, or right or authority to maintain any action against said defendants, or any of them, for recovery thereunder or foreclosure thereof (germane to Points 2, 4 and 5, Tr. p. 102).

Fourth Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint does not state facts sufficient to constitute a cause of action against answering defendants, for the reason that it shows upon the face of said complaint that the alleged securities sued on and sought to be foreclosed do not constitute an equitable lien, or mortgage, or any lien or mortgage, against the property described in the complaint and against which said securities are sought to be foreclosed (germane to Point 6, Tr. p. 102).

Fifth Assignment of Error.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, upon the ground and for the reason that the assignments of securities described in the complaint and the instruments creating the alleged indebtedness sued on were executed without the State of Arizona, and that if plaintiff, or the superintendent of insurance of the State of New Mexico, or the State of New Mexico, or any one, ever had any right to sue on and enforce or foreclose the same, such right was, at the time of the filing of the bill of complaint herein, and is now, barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928 (germane to Point 7, Tr. p. 103).

These we will take up in their order, they being the questions raised by these appellees' motion to dismiss, and being the reverse of our points relied upon for reversal (Tr. pp. 101, 102), and we decided it might be better to follow the words of the motion rather than the affirmative statement thereof.

FIRST ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint shows upon its face that plaintiff has not legal capacity to sue (germane to point relied upon for reversal, No. 1, Tr. p. 102).

SUMMARY.

Complaint alleges appellant is duly qualified and acting liquidating receiver of and for the superintendent of insurance of State of New Mexico (Tr. p. 26), and he brings the suit under an order of court appointing him (Tr. pp. 50, 51), which is a court of general jurisdiction, and he also holds an assignment, "Exhibit C" (Tr. pp. 51-53), from the superintendent of insurance.

On March 22, 1937, appellant presented a petition for leave to sue (Tr. p. 3), alleging all facts as to ownership of lien, the reason, necessity and authority for the suit, and that there were no Arizona creditors that can have any claim, and that the Republic Life Insurance Company of Dallas are claiming to own the property, as shown by Exhibit D attached (Tr. p. 20), being a letter from R. L. Daniel's office dated March 12, 1937.

ARGUMENT AND AUTHORITIES.

The new federal rules of procedure provide it is not necessary to aver capacity to sue or be sued in a representative capacity and if a party desires to raise an issue thereof *he shall do so by SPECIFIC negative averment.*

Rule 9-a, Rules of Civil Procedure.

The real party in interest must bring the suit * * * trustee of an express trust or a person expressly authorized by statute.

Revised Code of Arizona, 1928, Article 3727.

We alleged we are trustee acting for the registered policyholders, and we have an assignment of the lien (Exhibit C, Tr. pp. 51-53), from a statutory officer of the State of New Mexico.

The trustee of an express trust may bring suit.

Relf v. *Rundle,* 103 U. S. 222, 26 L. Ed. 337.

Bernheimer v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163.

Hopkins v. *Lancaster,* 254 Fed. 190.

O'Malley v. *Hankins,* (Ind.) 194 N. E. 168.

Martin v. *Bankers Trust Co.,* 156 Pac. 97, 18 Ariz. 55.

Practically unanimous are the decisions that hold that even foreign chancery receivers have the right to sue in a foreign state if no rights of citizens of that state are involved:

Ashcroft v. *Bream,* (Penn.) 51 F. (2d) 301.

Smith v. *Shepler,* (Cal.) 48 Pac. (2d) 999.

Van Kempen v. *Latham,* 195 N. C. 389, 142 S. W. 322.

Good v. *Derr,* (Wis.) (U. S. C. C. A., 7th Cir.). 46 F. (2d) 411, certiorari denied.

Seested v. *Bonfils,* (Colo.) 33 F. (2d) 185.

O'Malley v. *Hankins,* 194 N. E. 168, 207 Ind. 589.

Mell v. *McNulty,* (Ga.) 195 S. W. 181.

Devine v. *Detroit Trust Co.,* 52 Ohio App. -------, 3 N. E. (2d) 1001.

Canfield v. *Scripps,* (Cal.) 59 Pac. (2d) 1040.

This method of attack by demurrer has been used many times, and many times have the trial courts held

with the theory of the trial court, but the appellate courts have, where the receiver holds title, said he was entitled to sue and have a hearing.

The right of a receiver came up on a demurrer in Wisconsin and the trial court sustained the demurrer, holding the receiver had no right to sue, but the United States Circuit Court of Appeals reversed the case, after an excellent discussion.

Good v. *Derr*, 46 F. (2d) 411, certiorari denied 75 L. Ed. 1457.

A foreign receiver if he is the assignee of a mortgage can sue and foreclose in California.

Iowa & California L. Co. v. *Hoag*, 64 Pac. 1073.

The securities deposited with the insurance department of New Mexico is a special trust fund to pay off the registered policyholders, and until they are paid, no one else has any right to any of the funds.

Phillips v. *Perue*, 111 Tex. 112, 229 S. W. 849.

This was reviewed in an excellent case in New York.

In re Phillips, 200 N. Y. Supp. 639.

This same rule has been considered in many other cases.

People v. *Granite State, etc., Assn.*, 55 N. E. 1053.

Texas F. & Bonding Co. v. *Austin*, 246 S. W. 1026.

Blake v. *McClung*, 172 U. S. 239, 43 L. Ed. 432, 439.

The question as to the right of the superintendent of insurance to administer the funds through a receiver is discussed and the conditions are nearly identical.

Holloway v. *Federal R. L. Ins. Co.*, 21 Fed. Supp. 516.

Judge Bratton speaking for the Circuit Court of Appeals, Tenth Circuit, discussed this question fully and held a "liquidating receiver" was the proper person to handle the securities, and says all parties can present their claims and receive their *pro rata* part.

Hobbs v. *Occidental Life*, 87 F. (2d) 380 (C. C. A. 10th).

Occidental Life evidently tried to get the securities for the case was again before the Circuit Court of Appeals, Tenth Circuit.

Kansas v. *Occidental Life Ins. Co.*, 95 F. (2d) 935.

The lien sued upon here is admitted by receiver of Mississippi Valley Life Insurance Company an asset deposited with the insurance department to secure registered policy holders under Compiled Laws of New Mexico, 1929, Chapter 71-155, and no one has the right to divert the funds, especially Republic Life Insurance Company of Dallas, Texas, who made the reinsurance contract, Exhibit K (Tr. p. 79), for they specifically agreed in Paragraph 3 thereof that the insurance department of the State of New Mexico had the securities and to receive the reserve "in the manner that the insurance department of New Mexico shall approve but all excess to belong to Alvin S. Keys, receiver."

United States Circuit Court of Appeals said the right to participate could not be taken away by any reinsurance agreement.

Hobbs v. *Occidental Life*, 87 F. (2d) 380.

Therefore, appellant says that the appellant as liquidating receiver had legal capacity to sue, for he first obtained permission of Judge David Chavez of the District Court of New Mexico (Tr. p. 50), he presented a petition for leave to file this suit and leave was granted

by Judge Ling (Tr. p. 3, *et seq.*), and he holds a transfer or assignment of the lien sued upon from the superintendent of insurance of the State of New Mexico, and H. B. Hershey, the receiver of the Mississippi Valley Life Insurance Company, who owes the money, admits the obligation and that appellant has the right thereto.

SECOND ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, because it does not allege any amount due the policyholders for whose benefit and security the alleged securities were deposited with the superintendent of insurance of the State of New Mexico, or any amount sought to be recovered (germane to Point 3, Tr. p. 102).

SUMMARY.

We pleaded (Tr. p. 31) that James Q. Wallace and Two Republics Life Insurance Company made an executory contract; that it was deposited with the consent of Wallaces (Exhibit I, Tr. p. 73) with the insurance department of New Mexico, to secure registered policyholders of certain policies which were assumed by Mississippi Valley Life Insurance Company, and assigned by Exhibit J to the state bank examiner as of value of $32,000.00 (Tr. p. 76), and was admitted by H. B. Hershey, receiver, to be for the sum of $32,000.00 (Exhibit J, Tr. p. 75).

The contract was admitted by Mrs. (Wallace) Rowell to be for $32,255.00 and she made the deed to Republic Life Insurance Company pursuant to a contract recognizing the escrow obligation (Tr. p. 91).

Republic Life Insurance Company made a reinsurance agreement with the receivers of Mississippi Valley Life Insurance Company (Exhibit K, Tr. p. 77). Paragraph 3 recognizes that the insurance department of New Mexico had securities on deposit and they should have certain credit for their assumption of liens in the manner as the insurance department of New Mexico should approve.

The District Court of New Mexico authorized this suit to be brought, stating:

> "And it appearing to the court that the assets now in the hands of the receiver are insufficient to pay all claims now filed or to be filed herein." See order (Exhibit B, Tr. p. 50.)

ARGUMENT AND AUTHORITIES.

These questions were raised in the motion to dismiss (Tr. p. 84) and we will try to separate the basis of the motion.

First. The bill does not allege the amount due the policyholders for whose benefit the securities were deposited.

The court in his order deemed it necessary to bring the suit and liquidate the Wallace security (Exhibit B, Tr. p. 50), so we cannot question that here.

It is sufficient when comptroller levies an assessment, and one cannot question the order, it is conclusive.

Casey v. *Galli*, 94 U. S. 673, 24 L. Ed. 168.

No contract could be made by Republic Life which would give them a preferential right to any securities. They must make their claim through the insurance department of New Mexico in accordance with their agreement.

Hobbs v. *Occidental Life*, (C. C. A. 10th) 87 F. (2d) 380.

In many cases it is not necessary to allege that there are unpaid claims or that the assets in the hands of the receiver are insufficient to pay them.

Coddington v. *Canaday,* 157 Ind. 243, 61 N. E. 567.

High on Receivers, Sec. 212 (4th Ed.).

Van Gilder v. *Parker,* 69 Colo. 196, 193 Pac. 664.

The judgment of Judge Chavez (Tr. p. 50), "That the assets now in the hands of the receiver are insufficient to pay all claims, etc.," is entitled to full faith and credit, and this court should not question it.

Justice Brandeis tersely stated the rule.

McKnett v. *S. L. & S. F. Ry. Co.,* 292 U. S. 230, 78 L. Ed. 1227.

The Supreme Court in a suit brought by a receiver in Colorado against a stockholder for an assessment levied in Minnesota cited *Bernheimer* v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163, and *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749, and held that the levy made by a District Court in Minnesota could not be attacked in Colorado.

Chandler, Recr., v. *Peketz,* 297 U. S. 609, 80 L. Ed. 881.

This is exactly the position we take with regard to the judgment of the District Court in New Mexico, and there is a full note in 80 L. Ed., p. 883.

Wherefore, we feel the district court erred in sustaining the motion to dismiss, for we do not think the question as to claims is open for adjudication here, as the district court determined suit should be brought and ordered it brought to foreclose, and we pleaded (Par. XXII, Tr. p. 43) that the Republic Life Insurance Company has never submitted itself to the jurisdiction of

New Mexico and has not attempted to comply with the insurance statutes, and in their reinsurance contract (Exhibit K, Tr. p. 79) they agree to assume the liabilities with the consent of the insurance department of New Mexico, and are entitled to have the reserves credited in such a manner as the insurance department shall approve, and in no other way are they entitled to any of the securities on deposit there, including the Wallace contract and lien, so we feel, unless they comply with their contract they are entitled to nothing and it is their duty to plead and prove their compliance with Exhibit K or they have no rights thereunder. It is a proper matter for answer and proof, not by motion to dismiss, if the question is an open one in the face of Judge Chavez' order for it is our idea that if Republic Life Insurance Company is entitled to raise that question they must do it in New Mexico, where the trust is being administered.

THIRD ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, for the reason that said complaint does not show any lawful right or ownership in the plaintiff to the alleged securities, or lien sued on and sought to be foreclosed, or right or authority to maintain any action against said defendants, or any of them, for recovery thereunder or foreclosure thereof (germane to Points 2, 4 and 5, Tr. p. 102).

SUMMARY.

We plead deposit of the Wallace contract and lien to secure registered policyholders of National Life Insurance Company of the Southwest, made by Two Republics Life Insurance Company, the owner of the fee

(Tr. pp. 30-32), and that Mississippi Valley Life Insurance Company received a deed for land from Two Republics Life Insurance Company (Tr. pp. 34, 35) and they recognized our lien for $32,255.00.

H. B. Hershey as statutory receiver of Mississippi Valley Life Insurance Company, also recognized and admitted our lien (Tr. p. 21) upon the Wallace property and they held legal title and were obligated thereon.

Defendant, Mrs. Rowell, formerly Grace V. Wallace, one of the signers of Exhibit E (Tr. p. 55), the contract of sale, admitted the lien thereof, and she was obligated thereon (Tr. p. 89).

The insurance commissioner has power to transfer a note (deposited as security by an insurance company) to a receiver, and the receiver has power to sue.

Phillips v. *Perue,* 111 Tex. 112, 229 S. W. 849.

Hobbs v. *Occidental Life,* 87 F. (2d) 380 (C. C. A. 10th).

Cochrane v. *Pacific States Life,* 27 Pac. (2d) 196, 93 Colo. 462.

Kansas v. *Occidental Life,* 95 F. (2d) 935.

A foreign reciever may maintain a suit where title to the property has been vested in him by conveyance or statute.

Bernheimer v. *Converse,* 206 U. S. 516, 51 L. Ed. 1163.

Relf v. *Rundle,* 103 U. S. 226, 26 L. Ed. 337.

Lewis v. *Clark,* (C. C. A. 9th) 129 Fed. 570.

Justice Van Devanter discussed this question at great length and held the receiver could sue.

Converse v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749.

This same question arose in this court and plaintiff moved for dismissal on ground that the plaintiff had

no capacity to sue since he had neither title to the property under statute nor order of the court appointing him. Judge Sawtelle, speaking for this court, sustained the dismissal.

Oakes v. *Lake,* 62 F. (2d) 728.

Supreme Court said if receiver has title he has the right to maintain the suit.

Oakes v. *Lake,* 290 U. S. 59, 78 L. Ed. 168.

Receiver's right to sue in California is well stated.

Wright v. *Phillips,* 213 Pac. 288.
Smith v. *Shepler,* 48 Pac. (2d) 999.

Our authority, our ownership, and right to sue, are fully stated.

Hopkins v. *Lancaster,* 254 Fed. 190.

The Republic Life Insurance Company had no right under the reinsurance contract (Exhibit K, Tr. p. 79) to any part of the securities deposited with the insurance department of New Mexico, unless the registered policyholders accept the new contract, and then only in such manner as the insurance department of New Mexico shall approve (Paragraph 3), and if they do not accept the new company the policyholders have the right to the funds on deposit.

This condition has been before the courts, and they are pretty well settled as to the respective rights, for they hold it a trust fund for policyholders.

Lavell v. *St. Louis Mut. L. I. Co.,* 111 U. S. 264, 28 L. Ed. 423.

Old Republic, etc., Co. v. *Hershey,* 15 N. E. (2d) 985.

The facts are identical and this United States Circuit Court of Appeals, speaking through Judge Hawley,

held that Watson as liquidating receiver has the authority and right to foreclose.

Lewis v. *Clark*, 129 Fed. 570, 64 C. C. A. 138 (9th Cir.).

The appellant Watson's authority and title is the same as upheld by the United States District Court of Missouri, and we have the same authority and the same rights.

Holloway v. *Federal Ins. Co.*, 21 Fed. Supp. 516.

The same question was raised by demurrer to the right of state bank commissioner to sue, but Judge Lockwood, speaking for the Arizona Supreme Court, held the demurrer was improperly sustained, and he should be allowed to sue.

McKee v. *Stewart*, 28 Ariz. 511, 238 Pac. 326.

Appellant feels we have the ownership of the security for it was assigned to us by a state agency (superintendent of insurance) having title recognized by the receiver of the real owner, Mississippi Valley Life Insurance Company, who do not question our right, and this objection covering also our right and authority to sue these defendants, Republic Life Insurance Company, J. G. Vaughan and M. J. Dougherty, who we say make a claim to the land, and in view of the fact that this is an equitable foreclosure they should be defendants. This, we think, will not be questioned.

FOURTH ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint does not state facts sufficient to constitute a cause of action against answering defendants, for the reason that it shows upon the face of said complaint that the alleged securities sued on and sought to be foreclosed do not constitute an equitable lien, or mortgage, or any lien or mortgage, against the property described in the complaint and against which said securities are sought to be foreclosed (germane to Point 6, Tr. p. 102).

SUMMARY.

Complaint is brought to foreclose on an equitable lien on the Southeast 1-4 of Section 19, Township 1 North, Range 6 East, G. & S. R. B. & M., which was owned in fee by Two Republics Life Insurance Company (Par. IV, Tr. p. 31). They gave a contract to sell for $32,255.00 and James Q. Wallace and Grace V. Wallace (now Grace V. Rowell) agreed to buy it for said sum and both executed Exhibit E (Tr. p. 55). This contract of sale accompanied by deeds was escrowed and finally Wallaces executed an agreement (Exhibit D) consenting to the deposit with the superintendent of insurance of the securities referred to in said contract of January 16, 1923 (being Exhibit E), which is plain, and Mrs. Grace V. Rowell admitted signing Exhibit I (Tr. p. 89, Par. IV).

There was a number of assignments of the securities, the last one being Exhibit J (Tr. pp. 75, 76), on March 18, 1929, from Mississippi Valley Life Insurance Company, to state bank examiner, to secure the registered policyholders of National Life Insurance Company of the Southwest. The contract was extended by Grace V. Wallace two years after January 16, 1931 (she admits this in her answer, Par. V, Tr. p. 90).

Reinsurance contract (Exhibit K, Tr. pp. 77 *et seq.*) made full provision for protection of the policies secured by the deposit with the insurance department of the State of New Mexico (Par. III, Tr. p. 79).

Two Republics Life Insurance Company gave Mississippi Valley Life Insurance Company a deed to the property on June 4, 1928, recorded Book 223 of Deeds, page 74 (Par. XII, Tr. p. 35).

ARGUMENT AND AUTHORITIES.

In this case there is no question but what Mississippi Valley Life Insurance Company had a deed from Two Republics Life Insurance Company, which was recorded, so held legal title, and Grace V. Wallace (Mrs. Rowell) had a contract to buy the property from Two Republics Life Insurance Company, so she held the equitable title, and the insurance department of the State of New Mexico held as security the contract and deeds for the payment of $32,000.00 or $32,255.00, which were deposited in trust for a definite purpose, and both Mississippi Valley Life Insurance Company and Mrs. Rowell (Grace V. Wallace) recognized it.

Republic Life Insurance Company, J. G. Vaughan or M. J. Dougherty could not be in a better position than either Mississippi Valley Life Insurance Company or Grace V. Wallace (Mrs. Rowell).

There is a very full and exhaustive article holding the deposit of title papers creates an equitable mortgage.

41 C. J., p. 305, Sec. 54 *et seq.*

The Supreme Court of the United States recognized a transaction such as the Wallace deal was an equitable lien, and said:

> "Any other person coming into possession under the vendee, either with his consent or as an intruder, is bound by a like estoppel."

And also:

> "The debt did not affect his assignee personally, but as we have also shown it continued to bind the land in all respects as if the transfer had not been made. The trust was an express one."

And also:

> "As between trustee and *cestui que trust,* in the case of an express trust, the statute of limitation has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty and even fifty years."
>
> *Lewis* v. *Hawkins,* 90 U. S. 119, 23 L. Ed. 113.

The Circuit Court of Appeals for the Eighth Circuit holds that we are entitled to treat the transaction as a mortgage and foreclose.

Nixon v. *Marr,* 190 Fed. 913, 111 C. C. A. 503.

Deposit of title papers has always, even in England, been regarded as creating an equitable mortgage.

41 C. J., Sec. 54, p. 305 *et seq.*

There is also a good discussion under Equitable Mortgages, specially treating deposit of title papers.

19 R. C. L., p. 273, Secs. 44-48.

Equitable liens may always be enforced in the courts of equity.

21 C. J., p. 119, Note 47.

Most frequent of these is the equitable mortgage.

21 C. J., p. 119, Note 49.

This same trial court foreclosed an identical contract on the John R. Wallace tract of land in Case E-193, Phoenix, being entitled *Mississippi Valley Life Insurance Company* v. *John R. Wallace et al.,* the decree being dated July 31, 1931, and foreclosed the lien as a mortgage,

and in the suit M. J. Dougherty (one of the answering defendants herein) acted as attorney for plaintiff.

Appellant, therefore, says the court was in error on this ground, for the papers do constitute an equitable lien or mortgage, and this we ask this court to hold.

FIFTH ASSIGNMENT OF ERROR.

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, upon the ground and for the reason that the assignments of securities described in the complaint and the instruments creating the alleged indebtedness sued on were executed without the State of Arizona, and that if plaintiff, or the superintendent of insurance of the State of New Mexico, or the State of New Mexico, or any one, ever had any right to sue on and enforce or foreclose the same, such right was, at the time of the filing of the bill of complaint herein, and is now, barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928 (germane to Point 7, Tr. p. 103).

SUMMARY.

We sue on a contract (Exhibit E, Tr. p. 53) dated January 16, 1923, payable annually, the last payment $27,255.00 due January 16, 1928, and that it was extended by Grace V. Wallace (Mrs. Rowell) and Mississippi Valley Life Insurance Company for two years after January 16, 1931. Both Mississippi Valley Life Insurance Company, through the receiver Hershey (Tr. p. 21) and Mrs. Rowell (Grace V. Wallace) (Tr. p. 90) admit both the contract and the extension, have answered by sworn pleadings herein, and have not plead limitation or laches. Republic Life Insurance Company, which must hold under them, have raised the question in motion to dismiss (Tr. pp. 85, 86) and we alleged (Paragraph XVII,

Tr. p. 38) that their contract with Mrs. Rowell (Grace V. Wallace) recognized the escrow contract sued upon.

We plead (Par. XIV, Tr. p. 38) that there never was any transfer of title to Republic Life Insurance Company and their dealings were with full knowledge of our lien.

ARGUMENT AND AUTHORITIES.

This part of the motion to dismiss we think can be classed as a "speaking demurrer" to which must introduce evidence to show facts and we should have the right if plead to meet them by showing some facts which would not place us within the ban of that statute.

The new rules of civil procedure provide for pleading "affirmative defenses" including laches and statute of limitations should be set forth affirmatively.

Rule No. 8-c.

The defense of limitations is a personal one and may be pleaded by the debtor or waived and when the corporation which has given a mortgage does not make such defense it cannot be pleaded by one not vested with title.

Hauchett v. *Blair*, 100 Fed. 817, 41 C. C. A. 76 (9th Circuit).

Coram v. *Davis*, 95 N. E. 298, 209 Mass. 229.

Judge Morrow in the *Hauchett* v. *Blair* (*supra*) case states our position with respect to pleading, and also holding that limitations cannot be plead by a foreign corporation in a foreclosure suit against property within the state.

The case of *Coram* v. *Davis* (*supra*), in which Points 9 to 13 also state clearly our position with reference to raising the question on demurrer, that plaintiff could not sue until proper action was taken by the court, and

also Point 14 contains many citations holding laches must seriously affect the defendant to be a bar in an equity suit.

We plead Republic Life Insurance Company of Dallas, Texas, is a Texas corporation and a citizen and resident of that state, and J. G. Vaughan is a resident and citizen of Texas (Tr. pp. 27, 28), and the motion to dismiss admits these allegations. The Arizona statute specifically provides that being without the state tolls the statute, and this applies to corporations which have never complied with the laws of Arizona.

Revised Code of Arizona, 1928, Article 2066.

We have found no case in Arizona on this, but the California statute seems to cover the same exception, and they have held:

Foreign corporations come within the provisions of statutes which prevent the running of limitations in favor of absent debtor while they are without the jurisdiction of the state.

O'Brien v. *Big Casino G. M. Co.*, 99 Pac. 209, 9 Cal. App. 283.

In Nevada the question was also raised by demurrer but the court held, the allegation of foreign corporation being admitted, they were not entitled to plead limitations.

Nevada Douglas C. C. Co. v. *Berryhill*, 75 Pac. (2d) 992.

See, also, a very exhaustive opinion by Judge Harrison.

Hale v. *St. L. & S. F. Ry. Co.*, 39 Okla. 192, 134 Pac. 949.

And there is a very full and complete note attached to this case, setting out the holdings of many states, in:

L. R. A. 1915C, p. 544.

If the principal debtor left Arizona in 1902, the statute could not be invoked in his favor in 1911, and even if transferred to a corporation which holds title cannot set up limitations, for they occupy the position of merely holder of legal title, and had not paid consideration.

Holmes v. *Bennett,* 127 Pac. 753, 14 Ariz. 298.

The courts of Arizona go far in recognizing the equitable rule as to liens, in holding an unsatisfied mortgage securing a debt barred by limitations will not be removed as a cloud on title without the debt being first paid.

Provident Mut. B. & L. Assn. v. *Schwertner,* 140 Pac. 495, 15 Ariz. 517.

All we ask is the payment of the lien which not one person questions was on the land.

The United States Circuit Court of Appeals for the Eighth Circuit, speaking of laches, said:

> "Laches is an equitable doctrine, not controlled by or dependent upon statutes of limitation, although courts quite generally consider the time fixed by such statutes in actions of law of like character as having some bearing on the pertinency of the doctrine of laches, or, perhaps more accurately stated, on the burden of proof with respect thereto.
>
> "The applicability of the doctrine of laches is dependent upon the circumstances of each particular case. * * *
>
> "Mere lapse of time does not constitute laches. In addition, it must appear that something has occurred that would make it inequitable to grant the relief prayed for. * * *
>
> "Laches cannot exist as to a party, unless he has legal knowledge of the facts affecting his rights. * * *
>
> "The doctrine of laches is to assist and not to defeat justice—it is to be determined by considerations of justice. * * *

"It is sound doctrine that, if a party interposing defenses of laches has been responsible for and substantially contributes to the delay, he is precluded from taking advantage thereof. * * * In *Northern Pacific Ry. Co. et al.* v. *Boyd* (177 Fed. 804, 101 C. C. A. 18), the court said: 'It is impossible to escape the conviction that the delay was not prejudicial to the appellant, but was to its advantage, and that it was largely caused by its own acts * * * Where the party interposing the defense of laches has contributed to or caused the delay, he cannot take advantage of it.' "

Spiller et al. v. *St. Louis & S. F. R. Co. et al.*, 14 F. (2d) 284, 288.

We feel under any circumstances this rule should apply.

Mr. Justice Swayne said that between the vendor and vendee, in a case of this sort, there was a trust which embraced the purchase money and fastened itself upon the land.

The debt did not affect his assignee personally, but it continued to bind the land in all respects as if the transfer had not been made. The trust was an express one.

Lewis v. *Hawkins*, 90 U. S. 119, 23 L. Ed. 113, 114.

It should be remembered that statutes of limitations prescribed by a state do not apply to suits in equity in federal courts.

Hall v. *Ballard*, (C. C. A., 4th Circuit) 90 F. (2d) 939.

Standard Oil of California v. *Standard Oil* (C. C. A., 10th Circuit) 72 F. (2d) 524.

Another question arises.

When does the statute start in case the security is in the hands of the court or receiver?

He cannot act until he finds it is necessary to use the asset, for if it would not have been needed to pay registered policyholders it would have to be returned to Mississippi Valley Life Insurance Company or the receiver who is holder of legal title or his successor or assigns.

It was not until February, 1937, that it "appeared to the court that the assets now in the hands of the receiver are insufficient to pay all claims, etc." (Exhibit B, Tr. p. 50). So until the court determined it was necessary to sue we had no right to sue Mississippi Valley Life Insurance Company, and we filed suit March 22, 1937.

Coambs v. *Central H. & A. S. Co.*, 207 Ill. App. 396.

Coram v. *Davis*, 95 N. E. 298, 209 Mass. 229.

Assessments against stockholders for unpaid capital are not due until call.

In re Phoenix Hardware Co. (C. C. A. 9th) 249 Fed. 410.

Our position is much the same.

See also:

Scovil v. *Thayer*, 105 U. S. 143, 26 L. Ed. 968.
Hall v. *Ballard*, (C. C. A. 4th) 90 F. (2d) 939.
Blackburn v. *Irvine*, (C. C. A. 3d) 205 Fed. 217.
Kirschler v. *Wainwright*, 255 Pa. 525, 100 Atl. 484.

There is a good brief note under this case.
L. R. A. 1917C, 397.

Statute of limitations in this situation was discussed by Mr. Justice Day who said the cause of action did not accrue until the receiver could sue upon the assessment.

Bernheimer v. *Converse*, 206 U. S. 516, 51 L. Ed. 1163, 1176.

It should be remembered that the superintendent of insurance of New Mexico and also the appellant as receiver were charged with a specific trust and duty in the assignments, which were (Tr. p. 76):

> "To have and to hold said securities for the purpose of satisfying just claims of any policyholder in case of possible default of said first party in the matter of satisfying the same."

Neither the superintendent of insurance nor the receiver was entitled to receive the interest or the rents or profits of the land, nor were they entitled to its possession until the court said it was necessary to pay claims and upon demand being made as alleged in Paragraph XXIV, to which no reply was made, no denial of any right was asserted by anyone to our claim.

So as to get the benefit of the plea of laches there must be some material harm to the defendant, and there is none, but on the contrary they have had the benefit of the use of the place without payment of interest, rental or anything.

> *Hauchett* v. *Blair,* (C. C. A. 9th Circuit) 100 Fed. 817.

We, therefore, ask that this court reverse the holding of the district court and overrule the motion to dismiss, and render such judgment with reference to limitations as to the court may seem just and right.

Wherefore, appellant, John T. Watson, liquidating receiver, prays the court to reverse the judgment of the United States District Court for the District of Arizona, filed March 24, 1939, in the above-styled and numbered cause, for the reasons and upon the authorities set out in the specifications of error herein, for appellant feels that he has a good, valid, equitable lien upon the prop-

erty, that he has title and the right to sue thereon, and that his claim is not barred by either limitation or laches, and respectfully requests this court to render such judgment in the premises as may seem just and right.

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No. 9243

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN T. WATSON, Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico, Appellant,

vs.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, a corporation, H. B. HERSHEY, Receiver of Mississippi Valley Life Insurance Company, R. E. O'MALLEY and WILliam E. CAULFIELD, Receivers, J. G. VAUGHN, M. J. DOUGHERTY, GRACE V. ROWELL, Formerly Grace V. Wallace, WILLIAM H. WALLACE, a Minor, ANNA LOUISE WALLACE, a Minor, R. L. DANIEL, Chairman of the Board of the Insurance Commission of the State of Texas, Appellees.

ANSWERING BRIEF OF APPELLEES

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ANSWERING BRIEF OF APPELLEES

STATEMENT

Appellant's statement of pleadings and facts contains a recital of the allegations of the Bill of Complaint and of the points raised on appellees' motion

to dismiss. The statement correctly details the allegations of the complaint, but inasmuch as there was no trial upon the merits, the facts must be considered as alleged facts and not as proven facts.

Appellant has based his assignments of error on the points raised by appellees in their Motion to Dismiss the Bill of complaint, and we will, therefore, present our argument in the order of appellant's presentation. For the convenience of the Court, we will set the assignment up as a prefix to our argument on the assignment.

FIRST ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint shows upon its face that plaintiff has not legal capacity to sue.

ARGUMENT

Appellant asserts his right to maintain this suit by virtue of his appointment by the District Court of the County of Santa Fe, State of New Mexico, as Liquidating Receiver of and for the Superintendent of Insurance of the State of New Mexico.

He also claims to be vested with title to securities deposited with the Superintendent of Insurance by the Mississippi Valley Life Insurance Company, now insolvent, as security for the payment of policyholders of the National Life Insurance Company of

the Southwest, by virtue of an assignment to him of said securities by the Superintendent of Insurance of the State of New Mexico.

The record does not show and the appellant does not claim, that he was Receiver of the Mississippi Valley Life Insurance Company, the owner of the securities deposited with the Superintendent of Insurance; he claims to be, and sues as Receiver of and for the Superintendent of Insurance.

Appellant is a Chancery Receiver appointed as such by a County Court of the State of New Mexico. As such he has no capacity or jurisdiction to sue in the Courts of Arizona, even though the Court appointing him attempted to confer that right upon him. The leading case on the subject, and one which is still recognized as authority, is *Booth vs. Clark, 17 Howard (U. S.), 322*, where it is held that a receiver is an officer of the Court which appoints him, and in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of foreign jurisdiction, upon the order of the court which appoints him, to recover the property of the debtor.

On page 22 of his brief appellant asserts that practically unanimous are the decisions that hold that foreign chancery receivers have the right to sue in a foreign state if no rights of citizens of that state are

involved. In support of this assertion the following Federal decisions are cited: *Ashcroft vs. Bream (Penn.), 51 Fed. (2d) 301; Good vs. Deer (Wis.), 46 Fed. (2d) 411,* and *Seested vs. Bonfils (Colo.), 33 Fed. (2d) 185.* These cases show the rule, at least in the Federal Courts, to be contrary to the appellant's contention.

In the *Ashcroft* case the Court states:

> "As to the jurisdiction of this court to entertain the action. A receiver appointed by a court of one state or jurisdiction cannot maintain a suit in another state or in another jurisdiction; he is confined to the jurisdiction of the court which appoints him."

In the *Good* case the Court says:

> "It is settled law of the federal courts that a chancery receiver has no title to the property in his possession, and he has no power whatever to maintain an action in a state other than that in which his appointment is made. He is strictly a creature of the court which appointed him, and his jurisdiction cannot exceed that of the court which created him."

And in the *Seested* case:

> "Speaking generally, the rule in the federal court is that a receiver appointed by a court of

> chancery has no legal status outside the territorial jurisdiction of the court appointing him, but, by comity, the authority of receivers appointed in one state is often recognized by courts of another state, within whose jurisdiction they may seek to exercise their powers * * *. The question is becoming more and more one of discretion rather than jurisdiction."

A recent decision of the Circuit Court of Appeals, for the Ninth Circuit, following the doctrine announced in *Booth vs. Clark, supra,* is found in *Oakes vs. Lake, 67 Fed. (2d) 728,* and affirmed as to the doctrine by the United States Supreme Court in *Oakes vs. Lake, 290 U. S. 59, 78 L. Ed. 168.* While the rule in most of the State Courts follow the Federal rule, some of them hold that a Chancery Receiver may sue in a foreign State by comity. But even in these States the holding is practically unanimous that a Chancery Receiver cannot sue in a foreign jurisdiction as a matter of right, but only by comity. Such is the ruling in the cases from State courts cited by appellant.

Appellant states on page 22 of his Opening Brief that he presented a petition in the lower Court praying for leave to sue. An unsigned, undated and unverified petition is set out in the Transcript on pages 3 to 11, inclusive, but nowhere in the record does it show that leave to sue was granted by the Court. We know of no such leave having been granted. Even if leave to sue had been granted by the Court, the granting of such leave would not be conclusive; *53*

C. J. 342, Sec. 554. The Court had the authority to dismiss upon the ground that permission to sue was not granted in the first instance, or if granted, it was improvidently granted.

Appellant again contends that even if he did not have the right or permission to sue by virtue of his appointment as a Chancery Receiver, he has title to the securities sued on and therefore may sue as trustee of an express trust without the consent of the Arizona Court. The appointment of appellant as Receiver of and for the Superintendent of Insurance did not purport to, and could not, vest title to the securities in him. Appellant claims that the Superintendent held the securities as trustee for the holders of registered policies of the National Life Insurance Company of the Southwest. If he was trustee of these securities, the Court had no power to take the property out of his hands and appoint a receiver, except upon proof of misconduct or other causes which justify his removal; *Perry on Trusts and Trustees, 7th Ed., Sec. 594, page 1007; Chicago T. & T. Co. vs. Zinser (Ill.), 105 N. E. 718.*

Nor could the Superistendent of Insurance assign or delegate his trust to the Receiver:

> "The duties and powers of trustees cannot be delegated to others, unless there is express authority for that purpose given in the instrument creating the trust."

Perry on Trusts & Trustees, 7th Ed., Sec. 287, Page 508.

In the case of *Seely vs. Hill 49 Wis. 473*, 5 N. W. 940, a bond was given to the president of a bank and his successors in office, as trustee, to pay past indebtedness of the bank. The bank subsequently became financially embarrassed and made an assignment to one, Dodge, for the benefit of creditors. After the assignment the president assigned the bond to Dodge. The Court stated that the bond might or might not go to the assignee, Dodge, as a part of the securities for the outstanding indebtedness of the bank, but holds:

> "The law, however, is very clear, that the office and duties of a trustee being a matter of confidence, cannot be delegated by him to another, unless an express authority for that purpose be conferred on him by the instrument creating the trust.
>
> "This principle is elementary, and has only one exception, and that is where the trustee delegates the trust to another, with the consent of the sestui que trust, and all other parties interested in the trust."

Assuming, for the purpose of this argument, that the County Court of Santa Fe, New Mexico, had a right to appoint appellant Receiver over the securities which had been assigned to the State of New

Mexico, the attempted assignment of the securities by the Superintendent of Insurance adds nothing to appellant's authority to sue thereon. If the Court of New Mexico had authority to appoint appellant Receiver over the scurities, such appointment would not invest appellant with title to the securities and he could not sue thereon as an owner.

We do not question that a Statutory Receiver who acquires title by virtue of a statute, may ordinarily sue in a foreign jurisdiction, or that a trustee of an express trust may sue in his own name. Such is the holding in *Relf vs. Rundle, 103 U. S. 222*, and *Bernheimer vs. Converse, 206 U. S. 516*, cited by appellant. We contend, however, that the record does not show appellant to be either a statutory receiver, an owner, or a trustee of an express trust.

The cases of *Holloway vs. Federal R. L. Ins. Co., 21 Fed. Supp. 516*, and *Hobbs vs. Occidental Life Ins. Co., 87 Fed. (2d) 380*, cited by appellant do not support his contention. In these cases the Court does not hold that a receiver of the Superintendent of Insurance has a right to the securities, but that the Liquidating Receiver of the insolvent corporation has the right to administer them.

As we interpret the Statutes of New Mexico, by authority of which the securities were deposited (Exhibit A, Tr. 48; Exhibit D, Tr. 54) the Superintendent of Insurance was a mere depositary of the securities. And as we interpret the assignment of securi-

ties by the Mississippi Valley Life Insurance Company (Exhibit J, Tr. 74), which was the only assignment is force after the reinsurance agreement by which the Mississippi Valley Life Insurance Company took over the assets of the Two Republics Life Insurance Company and assumed all outstanding policies, including those of the National Life Insurance Company of the Southwest, the only authority the Superintendent had over the securities was to hold them and in case they were about to become barred by statute, or doubtful as to sufficiency, to tender them back to the assignee and require other securities to be deposited in lieu thereof.

SECOND ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, because it does not allege any amount due the policyholders for whose benefit and security the alleged securities were deposited with the superintendent of insurance of the State of New Mexico, or any amount sought to be recovered.

ARGUMENT

Appellant does not allege in his complaint what amounts or that any amounts are due to the policyholders of the National Life Insurance Company of the Southwest, for whose benefit the alleged securities sought to be foreclosed were assigned to the State

of New Mexico. We know of no rule which permits the foreclosure of a mortgage or other securities unless there is some certain sum due, or to become due, to the beneficiaries for whose benefit the mortgage or deposit of securities was made. The complaint, in order to state a cause of action, must state that there are policyholders in existence who are entitled to be paid out of the securities and the amount that the securities are obligated for. The complaint in the instant case does neither.

The case of *Coambs vs. Central Health & Accident Securities Co., 207 Ill. App. 396*, is exactly in point. In that case suit was brought to foreclose certain securities deposited with the Superintendent of Insurance of the State of Illinois for the benefit of policyholders. The policies had been reinsured by the defendant company as have the policies of the National Life Insurance Company of the Southwest by the appellee, Republic Life Insurance Company of Dallas, Texas, in the instant case; the Court says:

> "Presumably, through these reinsurance contracts the Royal was relieved of all liability, and the fact that no policyholder has intervened in this suit strongly indicates that there is no outstanding liability.
>
> "We think that it was for the superintendent to show the existence of bona fide policyholders having liens, if any such there were."

The court then quotes with approval from *Falkenback vs. Patterson, 43 Ohio 359, 1 N. E. 757,* as follows:

> "An action was brought by the receiver of a life insurance company organized under the laws of Ohio to foreclose notes and mortgages which had been deposited with the superintendent of insurance of that state, under a statute with a similar provision with the one at bar.
>
> "The supreme court, reversing a decree of foreclosure entered below and while holding that the makers of the notes and mortgages were estopped as to policyholders of the company, says:
>
> > 'But what, if anything, is due in this case to policyholders? There is no finding or evidence in the record from which we can ascertain any specific sum. The court finds that the liabilities of said company to policyholders and general creditors amount to $35,000 or more; * * *.
> >
> > 'It may be that no policyholder has a claim secured by these deposits. Before these mortgages can be foreclosed there must be shown some *specific amount due, or that may become due,* on account of such policyholders, *and that such amount is a claim against this specific deposit.*' "

In *Seely vs. Hills (Wis.), 5 N. W. 940,* the Court was passing on a complaint which failed to state who were entitled to participate in a bond deposited for security or the amount of the liability to the beneficiaries thereunder. The Court at Page 941 says:

> "What was the character of this past due indebtedness which the obligers really assumed to pay? What were the several amounts constituting it, and who were the several creditors of the bank to whom it was due and payable? What was the nominal value of the assets, and what were realized out of them to be applied to their payment? In what respect and particulars, and how, are these obligors in default, and in what specific sum? These are the material and important questions in this case, *and they are all unanswered by the complaint.* Does the plaintiff know these facts, or have information of them? If not, he has no right to complain, and shows no ground of action. A complaint for specific relief, or for recovery, must state some facts which show the default and liability of the defendant, and this complaint states no such facts."

Appellant contends that neither liability nor the amount of liability need be stated in the complaint because the order of Judge Chavez of the County Court of Santa Fe County, New Mexico, is conclusive. The order of Judge Chavez could not be conclusive against the appellees because they were not

parties to the action in which the order was made. The cases cited by appellant have to do with stock assessments. There is no similarity between liability on a stock assessment and liability under a deposit for security.

The stockholders' liability for an assessment is a statutory liability, and the assessment and collection is controlled by statute; *Bernheimer vs. Converse, 206 U. S. 516, at page 529, 51 L. Ed. 1163.*

But even in the case of a stockholders' assessment, the amount must be determined by the Court or Comptroller, before the assessment becomes conclusive.

> " * * * the order of assessment was conclusive upon stockholders only in so far as it decided the amount of assets or liabilities of the insolvent corporation, and the necessity of making an assessment upon the stock *to the extent and in the amount ordered.*"
>
> *Bernheimer vs. Converse, supra, at page 528.*

SEE ALSO: *Kennedy vs. Gibson, 8 Wall. (U. S.) 498, at Page 505; 19 Law Ed. 476;*

Casey vs. Galli, 94 U. S. 673, at Page 677, 24 Law Ed. 307.

Judge Chavez, in his order (Tr. 50) did not determine and fix the amount of the liability against the securities by reason of claims filed or to be filed with the Receiver, and in fact did not specify that any claims had been filed or were to be filed by the

policyholders of the National Life Insurance Company of the Southwest, the parties for whose security the deposits were made.

The liability under the policies of the National Life Insurance Company of the Southwest had been assumed by the appellee, Republic Life Insurance Company of Dallas, Texas, under the agreement between that Company and the Receivers of the Mississippi Valley Life Insurance Company, dated May 18, 1932 (Tr. 77-83). By this agreement there was a novation of liability by which the Republic Life Insurance Company of Dallas, Texas, assumed the liability of the Mississippi Valley Life Insurance Company as to the policies of the National Life Insurance Company of the Southwest; *Hobbs vs. Occidental Life Insurance Co., 87 Fed. (2d) 380.* If the Republic Life Insurance Company of Dallas, Texas, had defaulted under its assumption and reinsurance agreement, the complaint should state the amount of such default and the parties who have suffered by the default.

Again the complaint does not allege what, or if anything, was due from the Wallaces under the executory contract which is sought to be foreclosed.

THIRD ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint did not state facts sufficient to constitute a cause of action against said defendants, for

the reason that said complaint does not show any lawful right or ownership in the plaintiff to the alleged securities, or lien sued on and sought to be foreclosed, or right or authority to maintain any action against said defendants, or any of them, for recovery thereunder or foreclosure thereof.

ARGUMENT

Paragraph XVI of the amended complaint (Tr. 37) alleges that on the 18th day of May, 1932 the Receivers of the Mississippi Valley Life Insurance Company entered into a contract with the appellee, Republic Life Insurance Company of Dallas, Texas, by which appellee agreed to assume the policy obligations of the Mississippi Valley Life Insurance Company, including the registered policies issued by the National Life Insurance Company of the Southwest. The agreement referred to is attached to the complaint and marked "Exhibit K" (Tr. 77).

Section 3 of the agreement (Tr. 79) contains the following clause:

> "On all policies which are secured by deposit with the Insurance Department of the State of New Mexico the party of the first part shall be entitled to receive from said Insurance Department of the State of New Mexico, securities now on deposit to the value of the reserve of the policies on which said party of the first part assumes liability hereunder and the policyholders

> accept such assumption, and said party of the first part shall, with the consent of the Insurance Department of the State of New Mexico be entitled to have said reserves credited to it in such manner as the Insurance Department of the State of New Mexico shall approve and said Alvin S. Keys, Receiver, shall be entitled to the reserves on deposit with the said Insurance Department of the State of New Mexico, in excess of the claims which are against said deposit."

Alvin S. Keys, mentioned in the agreement, was the Liquidating Receiver of the Mississippi Valley Life Insurance Company by appointment in the State of Illinois, the State in which said Mississippi Valley Life Insurance Company was incorporated.

In the case of *Hobbs vs. Occidental Life Ins. Co., supra.*, a situation was presented similar to the situation in the case at bar. There the Occidental Life Insurance Company of California assumed the obligations of the policies issued by the Federal Reserve Life Insurance Company of Kansas. In an action brought by the Occidental Life Insurance Company to obtain possession of securities held by the Insurance Commissioner of the State of Kansas as security for the policyholders of the Federal Reserve Life Insurance Company of Kansas, the Court ordered the Commissioner to turn the securities over to the Occidental Life Insurance Company. In passing upon the status of these securities, the Court says:

"The contention to which the commissioner devotes extended argument is that the reinsured policies are still in effect and will remain so until they are terminated by death, withdrawal of surrender value, or default in payment of premiums. As previously stated, the statutes in Kansas require the deposit of securities, authorize substitution and permit the withdrawal of excesses over policy liabilities. And in obedience to the mandate contained in Sec. 40-407, these policies each bear a certificate signed by the commissioner certifying that its security be a pledge of bonds or notes and mortgages on real estate deposited with the treasurer in an amount equal to the full legal reserve; but it does not follow from these provisions of the statutes and certificates that the policies are now in force, in the sense that the commissioner is required to retains the security. It is well settled that upon the adjudication of insolvency and the appointment of a receiver on May 22, the policies of the Federal Reserve were terminated as enforcible obligations for their respective face amounts, and the holders became creditors, each for an amount equal to the then value of his policy with the right to participate pro rata in the assets in receivership. * * * The privilege of participating in such assets was the only right which the holders had upon the adjudication of insolvency until the reinsurance agreement became effective."

As we view the situation here, the appellee, Republic Life Insurance Company of Dallas, Texas, owned the securities to the extent of the legal reserve of the policies of the Mississippi Valley Life Insurance Company, the Two Republics Life Insurance Company, and the National Life Insurance Company of the Southwest, assumed and reinsured by it, and that the overplus, if any there was, was to be turned over to the Liquidating Receiver of the Mississippi Valley Life Insurance Company. How the securities were to be administered is not stated in the reinsurance agreement, but it seems to us that is a matter entirely between the Republic Life Insurance Company and the Liquidating Receiver of the Mississippi Valley Life Insurance Company. The authority of the superintendent over the securities and his duties pertaining thereto had terminated.

In *Holloway vs. Federal Reserve Life Ins. Co. 21 Fed. Supp. 516, at Page 518* it is said:

> "A paramount question arises as to how the Superintendent of insurance can apply the securities now held by him. He is not an executive receiver; he is not authorized to liquidate the company; and moreover the Federal Reserve is no longer a going concern. It was his duty to hold securities while the company was doing business, and to do so, as trustee for policyholders in Missouri. * * *

> "The responsibility of the superintendent of insurance as an executive officer is completely discharged when a court, whose duty it is to administer the estate, calls for a surrender and delivery of such assets."

The fact, if it be a fact, that the policyholders of the National Life Insurance Company of the Southwest may have a preferred right to the securities here involved does not change the situation; for, as stated in *Holloway vs. Federal Reserve Life Ins. Co., supra:* at page 518:

> "Granted that such securities are impressed with a lien, the court must be trusted to hold a disposition to enforce such lien."

It will be noted in the Holloway case, that the Receiver to whom the securities were awarded was the Liquidating Receiver of the insolvent corporation; he was not, as in the case at bar, a Receiver of and for the Superintendent of Insurance, the holder of the deposit. Both the *Hobbs* and the *Holloway* cases hold that the Superintendent of Insurance, upon insolvency of the company which deposited the securities, lose all rights thereto and all authority to administer the same, and that his only remaining duty is to turn them over to the Liquidating Receiver of the insolvent insurance company, and that they are to be administered by the Liquidating Receiver, subject to any preferred lien of the policyholders for whose benefit such securities were deposited. This being the rule, the

Superintendent of insurance would have no power or authority to assign the securities to a receiver appointed solely for the administration of the securities.

It is contended by appellant that appellee, Republic Life Insurance Company of Dallas, Texas, had no right to the securities, notwithstanding the agreement "Exhibit K" entered into between it and the Liquidating Receivers of the Mississippi Valley Life Insurance Company, save and except under such terms as the Superintendent might impose. Under the rule laid down in the *Hobbs* and *Holloway* cases, the Liquidating Receivers of the Mississippi Valley Life Issurance Company had the right to administer these securities. The Receivers, under authority of the Court of the domicile of the corporation, turned them to the Republic Life Insurance Company of Dallas, Texas, in consideration of the assumption by the Republic Life Insurance Company of the outstanding policies of the National Life Insurance Company of the Southwest, to the value of the reserves of said policies. The right to receive the securities to the value of the reserves is positive. The manner of the application of credit of the reserves to it is the only thing left for the approval of the Superintendent of Insurance.

It is apparent from the complaint that, by reason of the reinsurance contract, some one in authority transferred the escrow contract upon which the suit at bar is based, to Republic Life Insurance Company, for it is alleged in Paragraph XVII of the Complaint

(Tr. 38) that "on August 22, 1932, one, E. H. Banta, claiming to be the owner of the lands aforesaid *by transfer of the escrow contract aforesaid, by Republic Life Insurance Company of Dallas, Texas.* " * * * commenced suit in the Superior Court of Maricopa County, Arizona, against A. O. Pelsue as Receiver of the Mississippi Valley Life Insurance Company * * * which resulted in a certain decree dated August 22, 1932 adjudging said Banta to be the owner in fee simple of the lands aforesaid and ordering said Receiver to execute to said Banta a deed therefor."

It is apparent from the above recital that the escrow contract was one of the muniments of title by which Banta established his title in fee simple in the Superior Court to the premises described in the escrow contract and involved in this suit. Inasmuch as the Court quieted title in Banta it must be presumed that satisfactory evidence was presented to the Court, not alone showing a proper transfer of the escrow contract to Banta by the Republic Life Insurance Company, but by a proper transfer from the proper authority to the Republic Life Insurance Company, his predecessor in ownership. After the entry of the decree quieting title in Banta, the Republic Life Insurance Company and Grace V. Rowell (formerly Wallace), individually and as Executrix of the Estate of James Q. Wallace, conveyed whatever interest they might have in the property to Banta (Tr. 39).

FOURTH ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, holding in substance that said complaint does not state facts sufficient to constitute a cause of action against answering defendants, for the reason that it shows upon the face of said complaint that the alleged securities sued on and sought to be foreclosed do not constitute an equitable lien, or mortgage, or any lien or mortgage, against the property described in the complaint and against which said securities are sought to be foreclosed.

ARGUMENT

The alleged securities which appellant seeks to have decreed to be an equitable lien upon the lands described in the complaint (Paragraph VII, Tr. 30), and which he seeks to foreclose, consist of an escrow of an executory contract of sale and reciprocal deeds between the Two Republics Life Insurance Company as vendor and James Q. Wallace and Grace V. Wallace as vendees.

After alleging the execution and escrow of the contract and the warranty deed from the Two Republics Life Insurance Company to the Wallaces, and the quit-claim deed from the Wallaces back to the Two Republics Life Insurance Company, the complaint recites (Tr. 32):

> "And it was provided by said executory contract that upon performance of the terms and

> conditions of said contract by the said Wallaces to be performed, said Salt River Valley Trust and Savings Bank, escrow holder aforesaid, should deliver to said Wallaces the warranty deed aforesaid; and it was further provided that if said Wallaces should make default in the terms and conditions of said contract by them to be performed, said escrow holder should return to said Two Republics Life Insurance Company the warranty deed aforesaid, and to deliver to said Two Republics Life Insurance Company the quit-claim deed aforesaid.

The escrow contract is in the form customarily used in Arizona and many of the western states for many years, and is nothing more than an agreement to convey if and when the purchase price has been paid in accordance with the terms of the agreement, and is forfeitable for default in making the payments.

The Arizona Legislature has recognized this method of sale by passing an Act relieving the purchaser against unconscionable forfeiture by providing a period of default necessary before such forfeiture can be enforced. *Paragraph 2781, Revised Code of Arizona, 1928,* provides:

> "A forfeiture of the interest of the purchaser in default under a contract for the conveyance of real property may be enforced only after the expiration, after such default, of the following periods: Where the purchaser has paid less than

> twenty per cent of the purchase price, thirty days; where the purchaser has paid twenty per cent, or more, but less than thirty per cent, of the purchase price, sixty days, etc."

Under a contract and escrow, such as the one involved in this suit, title to the property does not pass until delivery out of escrow.

> "The general rule is that the instrument deposited does not become a deed and operate to convey the title until the second delivery, or, perhaps, more accurately speaking, until the performance of its conditions."
> *Foulkes vs. Sengstaken 83 (Ore.), 118, 163 Pac. 311, at Page 314.*

This is the rule in Arizona:

> "As we understand the defendant, he in effect, contends the transaction as it is described in the writing, was a sale of the ranch property by plaintiff to him. But that cannot be, since a sale imports an actual transfer of title from the grantor to the grantee. Here the deed of conveyance was placed, as the agreement provided it should be, in escrow along with the agreement, with the understanding that the escrow keeper should not deliver it to the grantee until his notes were paid. There was therefore only an agreement to sell the premises or a contract to be performed in the future, which in its very

nature might not have been completed because of breaches, or recisions, or releases, that might occur.

Lewis vs. Rouse, 29 Ariz. 156, 240 Pac. 275, at Page 276.

"The deed which she and her husband executed to Dameron had not been delivered when she died but was held in escrow, and consequently the legal title had not passed to him but remained in Mollie Potts Kennedy (grantor) during her lifetime as security for the unpaid purchase price and at her death went to Mrs. Snow." *Snow vs. Kennedy, 36 Ariz. 475, 286 Pac. 930, at Page 932.*

The legal title not having passed to the Wallaces under the escrow contract, there was no title in them which could be mortgaged or upon which a mortgage could be imposed by a court of equity.

In *American Mtg. Co. vs. Logan, 90 Colo. 157, 7 Pac. (2) 953, at Page 954,* the mortgage company purchased a tract of land from the Logans under a contract of sale similar in effect to the contract of sale in the case at bar. The mortgage company contended that the contract created a mortgage and must be foreclosed as such; the Court says:

"The contention of the mortgage company is that the transaction created between the mort-

gage company and the Logans the relation of mortgagor and mortgagees, and therefore that, in order to foreclose the company's rights, there must be a judicial foreclosure as in the case of mortgages, with the accompanying statutory right of redemption. With that contention we do not agree."

Continuing, the Court holds that there can be no mortgage unless the mortgagor has some real estate to pledge, in the following language, found on *page 954:*

"It is next argued that the contract must be treated as an equitable mortgage, but there can be no mortgage of any kind unless the mortgagor has some real estate to pledge. This the defendant did not have. Whatever rights, either legal or equitable, he had in the land did not affect the contract in question in its character as an agreement to purchase. Being such an agreement, the plaintiff had the right to proceed under the unlawful detainer act."

SEE ALSO: *Schiffiner vs. Chicago T. & T. Co., 79 Colo. 249, 244 Pac. 1012;*

A conveyance in escrow is not a mortgage:

"The defendant expressly pleaded that it was an escrow; and hence there can be no room for

the contention that the instrument should be treated as a mortgage."

Foulkes vs. Sengstaken, supra, at Page 314.

Under an escrow contract the vendor does not have a lien for the purchase price. His security is the title to the land. In *Snow vs. Kennedy, supra*, property was contracted to be sold by deeds in escrow such as in the case at bar; the Arizona Supreme Court *on page 933*, adopts the rule stated in *Pomeroy's Equity Jurisprudence (3d Ed.), Sec. 1260*, as follows:

> " * * * the vendor of real estate before conveyance, 'although possession may have been delivered to the vendee, and although under the doctrine of conversion the vendee may have acquired an equitable estate, * * * retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure—namely, by paying the price according to the terms of the contract. * * * In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien; his title is a more efficient security, since the vendee cannot defeat it by any act or transfer to or with a bona fide purchaser.' "

The only case cited by appellant in support of his

contention that the escrow contract here involved, constituted an equitable mortgage, is *Nixon vs. Marr, 190 Fed. 913.* That case is decided upon the theory that the retention of the legal title by the vendor was merely as security, and that he was entitled to treat the contract as a mortgage. The opinion cites *Smith vs. Kirchener, 7 Okla. 166, 54 Pac. 439,* and *Lewis vs. Hawkins, 23 Wall. 119, 23 Law Ed. 113,* as authority. Both of these cases involve title bonds. A different rule applies in the case of a title bond than does in the case of an ordinary contract of sale in escrow. There is a dissenting opinion is the case by Justice Sanborn following the rule announced in the above cases. The rule which prevails in Arizona.

Appellant asserts on pages 33 and 34 of his brief that the deposit of title papers has always been, even in England, regarded as creating an equitable mortgage. Here the facts do not constitute a deposit of title papers. Under the doctrine that the deposit of title papers creates an equitable lien upon the title of the borrower, the title papers referred to are unrecorded documents by which the borrower obtains title. In this case it would be unrecorded deeds by which the Two Republics Life Insurance Company and the Mississippi Valley Life Insurance Company obtained title to the property in question. It does not refer to the deed executed by the borrower to the escrow purchaser.

However, this doctrine does not prevail in Arizona and only prevails in a few of the far eastern states.

"It is a rule of long standing in England that an equitable mortgage on land is created by the mere deposit of title deeds as security for a debt. This rule grew out of the fact that there was no general system of registration in that country and the system of conveyancing rendered it necessary to have possession of the muniments title. In the United States a few courts seem to have accepted the English doctrine but it is rejected in most jurisdictions as having been superseded by the system of registration of land titles which prevails in this country."

19 R. C. L. 277, Section 48.

SEE ALSO: *41 C. J. 309, Sec. 62.*

Aside from this, the contract and deeds were not deposited with the Insurance Department of the State of New Mexico in trust, as contended by appellant. They were deposited in escrow. The Insurance Department was merely agent for the vendor and vendees. The Insurance Department had no control or authority over the documents other thas to deliver them to the vendees in case of full payment of the purchase price or to redeliver them to the vendor in case of default in payment of the purchase price.

If it be appellant's theory that the assignment constituted an equitable mortgage, that theory is equally untenable.

In the first place the vendor not having a lien or right to a lien upon the property as security for the payment of the purchase price, it could not assign something it did not have, and in the second place, the assignments do not purport to impress a lien upon the land itself.

The assignments under which appellant asserts title to the alleged securities and his right to maintais this suit, is one from the Two Republics Life Insurance Company to the State of New Mexico, described in Paragraph VII of the Complaint (Tr. 32), and set forth in "Exhibit F" (Tr. 62), and one from the Mississippi Valley Life Insurance Company to the State of New Mexico described in Paragraph XIV of the Complaint (Tr. 36) and attached to the complaint as Exhibit"J" (Tr. 75).

These assignments make no reference whatsoever to the land but only refer to the purchase price to be paid for the land. The interest of the Two Republics Life Insurance Company and the Mississippi Valley Life Insurance Company in the land itself was not assigned or conveyed, and there is nothing in the wording of the assignments from which it can be inferred that it was the intention of the assignors to create or to assign to the State of New Mexico a lien upon the land itself. The assignment refers to the purchase price payments only.

While it is true that no precise legal terminology is required to enable a court of equity to impress an

equitable lien against property, it is always an essential that the instrument show it was the intention of the parties to give a security for a debt or obligation upon *some particular property.*

In *New Orleans Nat. Bank vs. Adams, 109 U. S. 211, at Page 214, 27 Law Ed. at Page 911* it is said:

> "While it may be conceded that no precise form of words is necessary to constitute a mortgage, yet there must be a present purpose of the mortgagor to pledge *his land* for the payment of a sum of money, or the performance of some act, or it cannot be construed to be a mortgage."

In *Smith vs. Rainey, 9 Ariz. 362, 83 Pac. 463, at Page 464,* it is said:

> "The intention must be to create a lien upon the *property,* as distinguished from an agreement to apply the proceeds from the sale of it to the payment of the debt."

In *Vaniman vs. Gardner, 99 Ill. App. 345, at page 348,* it is said:

> "While, as a general rule, any written contract entered into for the purpose of pledging property or some interest therein as security for a debt, which is informal or insufficient as a common law or statutory mortgage, but which shows that it was the intention of the parties that it should operate as a *charge upon the prop-*

erty, will constitute an equitable mortgage and may be enforced as such in a court of equity, yet a mere promise to pay out of the proceeds of the sale of the property is not sufficient to create an equitable mortgage upon the property itself."

SEE ALSO: *Barber vs. Toomey, 67 Ore. 452, 136 Pac. 343, at Page 346.*

And the intention must be ascertained from the terms of the instrument itself:

"For the purpose of ascertaining the intention of the parties, resort must be had, first, to the instrument itself."

Stephen vs. Patterson, 21 Ariz. 308, 188 Pac. 131, at Page 132;

"Can parol testimony be admitted to aid Wadgymar's imperfect agreement and make a mortgage of it? We think not. That would be in violation of the statute of conveyances, and would be creating an incumbrance upon real property by verbal testimony. It would be also objectionable as adding to and varying the written agreement of the parties by parol. It would be virtually to make a contract for them. This undertaking does not upon its face create a mortgage upon real property."

Boehl vs. Wadgymar, 54 Tex. 589, at Page 592.

SEE ALSO: *Hibernian Bank vs. Davis, 295 Ill. 537, 129 N. E. 540.*

The customary method, and the only method with which we are familiar, by which a vendor in an escrow contract can secure a debt of his own by the land specified in the contract, is for the vendor to give a mortgage upon the land, subject to the rights of the escrow purchaser, or to place a deed in escrow from the vendor to his assignee of the contract, transfering title to the assignee in case the purchaser defaults in the payment of the purchase price. If it had been the intention of the Two Republics Life Insurance Company to give the security of the land itself, to the State of New Mexico, one of these methods would have been followed.

In *Baum vs. Grigsby, 21 Cal. 172, at page 177,* the Court says:

> "There is a marked distinction between the lien of a vendor after absolute conveyance and the lien of a vendor where the contract of sale is unexecuted. In the latter case, the vendor holds the legal estate as security for the purchase money. He can assign his contract *with the conveyance of the title,* and in such case his assignee will acquire the same rights and be subject to the same liabilities as himself."

The case of *Jackson vs. Wenk, 224 Mich. 578, 194 N. W. 1000,* is one in which Wenk purchased from

Goetz by an executory contract of sale a tract of land; the Court says:

> "Wenk had but a contingent equitable interest in the property, subject to cancellation for default in performance on his part at any time until he paid the contract price in full. Only by Goetz *conveying the property and assigning the contract* to Jackson could Jackson become owner of the contract with the power to perform or enforce it."

On page 40 of appellant's brief it is stated that, in the court below in which the case at bar was tried, an identical contract with the one at bar was foreclosed as a mortgage. Appellant is in error in this. The case referred to involved a deed given as security for a debt and which was construed to be a mortgage and foreclosed as such. We know of no case in Arizona where a contract of sale, such as the one at bar, has been construed to be a mortgage, equitable or otherwise, and foreclosed as such.

FIFTH ASSIGNMENT OF ERROR

The trial court erred in sustaining the motion to dismiss the first amended bill of complaint, upon the ground and for the reason that the assignments of securities described in the complaint and the instruments creating the alleged indebtedness sued on were executed without the State of Arizona, and that if plaintiff, or the superintendent of insurance of the State of New Mexico, or the

State of New Mexico, or any one, ever had any right to sue on and enforce or foreclose the same, such right was, at the time of the filing of the bill of complaint herein, and is now, barred by the provisions of Subdivision 3, Paragraph 2061, Revised Code of Arizona, 1928.

ARGUMENT

Under appellant's Fifth Assignment of Error three propositions are raised; First, that the bar of the statute is not available because the appellee Republic Life Insurance Company of Dallas, Texas, and appellee, J. G. Vaughn, are nonresidents of the State of Arizona; second, that the facts in the case at bar raise a trust and that the statute does not run in favor of a trust; and third, that the cause of action did not accrue until the County Court of Santa Fe County, New Mexico, made its finding that a suit to foreclose was necessary.

As to the right of a foreign corporation to plead the statute of limitations, the decisions are not uniform. The rule followed in the cases cited by appellent is to the effect that a foreign corporation which has not qualified to do business within the state cannot plead the statute in any event. The majority rule is that if the corporation has an agent in the state upon whom service of process can be made, the statute is available. *Fletcher Cyc. Corp., Permanent Ed., Vol. 18, Page 245, Sec. 8676.* The matter has not been passed upon by the Supreme Court of Arizona.

The reason for the majority rule is stated in *Fletcher Cyc. Corp., Permanent Ed., Vol. 18, Page 253, Sec. 8676,* as follows:

> "The reason for the majority rule that absence from the state and residence out of the state, in the sense of a statute providing that if the person against whom a cause action has accrued shall be absent from or reside out of the state, the time of his absence or residence out of the state shall not be taken as any part of the time limiting the commencement of the action, means such absence and such nonresidence as renders it impracticable at all times to obtain service of process, so that while a corporation's technical legal residence may be where it was created, the residence and status for purposes of suit will be where it can through its officers and agents be reached by process."

As we understand the foregoing statement, the only purpose of the rule is that a creditor shall not be deprived of his right to sue and foreclose by reason of inability to obtain service upon the debtor. If the creditor is not deprived of this right, the reason for the rule fails. In all the cases which we have examined in which a foreign corporation has been denied the right to plead the statute, the foreign corporation has been the debtor. In such case the creditor would be deprived of his remedy of obtaining a personal judgment by reason of his inability to obtain personal service.

In the case at bar the Wallaces (the alleged debtors under the escrow contract) were at all times residents of Arizona. The appellee, Republic Life Insurance Company, and the appellee, J. G. Vaughn, were in nowise obligated under the contract and the only necessity of their being made parties is that they obtained an interest in the property subsequent to the date of the alleged equitable mortgage. The Wallaces have been amenable to personal service at all times and the Republic Life Insurance Company and Vaughn have been amenable to substituted service which is sufficient to test their rights to the property if, as alleged by appellant, their rights are subject and subordinate to the appellant's alleged lien.

We have searched diligently but have not been able to find a case in which this point has been directly raised, but it seems to us that inasmuch as appellees absence from the state did not deny the right of suit and the obtaining of full relief, that the rule depriving them of the right to interpose the statute should not apply.

It is stated in *City of St. Paul vs. Chicago M. & St. Ry. Co. (Minn.), 48 N. W. 17, at page 21:*

> "The purpose of the statute of limitations in allowing specified times for commencing actions and in making exceptions to the running of such times, is a practical one. It is to give the plaintiff what the legislature deemed a reasonable

opportunity to seek a remedy. No mere theoretical absence from the state, not preventing in anyway a full and complete remedy for the time specified, can have been intended by Section 15."

There is no question but that Wallaces could have pleaded the statute if they wished to, and there is no question that if an original debtor or mortgagor fails to plead the statute that a subsequent purchaser of the property may do so. *Sanger vs. Nightingale, 122 U. S. 176; Ewell vs. Daggs, 108 U. S. 143; Graves vs. Seifried (Utah), 87 Pac. 674; 37 C. J. 718, Sec. 33.*

In the case at bar the appellee, M. J. Dougherty, was at all times a resident and citizen of the State of Arizona (Tr. 28) and there is no question as to his right to plead the statute.

Second, the relation of trustee does not exist. As we have hereinbefore shown, title under the contract of purchase remained in the vendor. The circumstances were not such as existed in the case of *Lewis vs. Hawkins, 90 U. S. 119, 23 Law Ed. 113*, cited by appellant. In that case a title bond was given by the vendor and in such case the vendor holds the title in trust for the vendee and the vendee is trustee for the vendor as to the purchase price.

Third, the cases cited by appellant in support of his contention that a cause of action did not arise under the contract until the Judge of the County

Court of Santa Fe County, New Mexico, made his determination that it was necessary to sue, are all on stockholders' liability. In such case, of course there is no cause of action until the Court or the proper authority has determined that a stockholders' assessment is necessary and fixes the amount thereof. Such is not the case here however. Here, installment payments became due and payable under the contract from January, 1924. The last installment was due and payable in January, 1928. The determination by the County Court of Santa Fe County, New Mexico, made in February, 1937, that it was necessary to sue on the contract could not in anywise affect the running of the statute as against the payments.

Further than this, under the rule announced in *Hobbs vs. Occidental Life Insurance Co., supra,* upon the insolvency of the National Life Insurance Company of the Southwest the policies of that company were terminated as enforcible obligations for their respective amounts and policyholders became creditors each for an amount equal to the then value of his policy. The right of action against these securities accrued at that time and the statute of limitations would begin to run at that time. The liability to which the securities could be subjected could have readily been ascertained at the time of the insolvency of the National Life Insurance Company of the Southwest by computing the then value of the outstanding policies in New Mexico at that time or if it could

not be determined at that time, it certainly could have been determined at the time the Mississippi Valley Life Insurance Company became insolvent in 1932, and the Republic Life Insurance Company of Dallas, Texas, entered into the agreement with the Receivers of the Mississippi Valley Life Insurance Company reinsuring the policies of the National Life Insurance Company of the Southwest.

Appellant asserts that the Superintendent of Insurance was not guilty of laches. It appears to us that he was guilty of gross and inexcusable laches. The complaint does not disclose when the policies of the National Life Insurance Company of the Southwest were registered, but it does show (Paragraph VI, Tr. 30) that the Two Republics Life Insurance Company took over the assets of the company and assumed its policy obligations prior to the year, 1923. The complaint further shows that the Two Republics Life Insurance Company assigned the purchase price payments under the Wallace contract on April 5, 1923 as security for the registered policyholders of the National Life Insurance Company of the Southwest (Paragraph VIII, Tr. 32). These payments became due $1,000.00 January 16, 1924, $1,000.00 January 16, 1925, $1,500.00 January 16, 1926, $1,500.00 January 16, 1927, and $27,255.00 January 16, 1928 (Tr. 56). Only the first two payments were made; $1,000.00 in 1924 and $1,000.00 in 1925 (Tr. 90.) No action was taken by the Superintendent until this suit was filed on March 22, 1937.

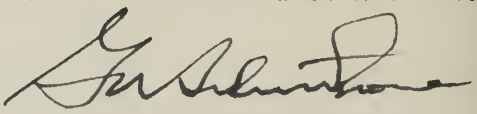
We can assume that no interest or rents, or profits, were collected by the Superintendent of Insurance as it is stated on page 41 of appellant's brief that neither the superintendent or the receiver was entitled to receive the interest or rents or profits. The Suprintendent of Insurance must have known that these purchase price payments and interest were not being made to the Two Republics Life Insurance Company or to the Mississippi Valley Life Insurance Company for they had no right to collect them by reason of their assignment.

On May 18, 1932 the appellee, Republic Life Insurance Company, reinsured and assumed the liabilities under the policies issued by the National Life Insurance Company of the Southwest, the Two Republics Life Insurance Company, and the Mississippi Valley Life Insurance Company, and in consideration thereof obtained an interest in the securities assigned to the State of New Mexico, including the Wallace escrow agreement (Tr. 37). Banta quieted title to the land in August of 1932 and a deed from the Receiver to Banta was duly recorded (Paragraph VII, Tr. 38). Mrs. Wallace deeded her equity in the land on September 22, 1932 to Banta, which deed was also recorded. The recording of these instruments was constructive notice to the Superintendent of Insurance.

During the period of twelve years from the time the last payment was made under the contract to the bringing of the suit, and despite the fact that the last payment became due in 1928, no action was taken

by the Superintendent of Insurance, either to tender the securities back to the Two Republics Life Insurance Company, or the Mississippi Valley Life Insurance Company, or the Republic Life Insurance Company, and demand new securities in lieu thereof, or to proceed for the collection of the payments of purchase price assigned. Such a state of facts does not import such diligence as required in equity.

We respectfully submit that for the reasons shown, the judgment of the lower court dismissing the Bill of Complaint was correct and should be affirmed.



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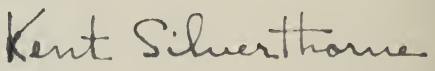

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 9243.

JOHN T. WATSON, LIQUIDATING RECEIVER OF AND FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW MEXICO, APPELLANT,

VS.

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REPLY BRIEF OF APPELLANT.

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SUBJECT INDEX

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REPLY BRIEF OF APPELLANT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant desires to reply to the answering brief of the appellees filed in the above-styled and numbered cause, and we hope by the reply to simplify the issues so as to aid the court in arriving at their decision, and to that end will reply to the assignments in their numerical order as set out in appellees' brief.

FIRST POINT.

Has appellant the right to bring this suit to foreclose an equitable lien which stands against the property described in our complaint?

The existence of the lien is not questioned by the receiver of the Mississippi Valley Life Insurance Company, nor by Mrs. Rowell (formerly Mrs. Wallace), who we allege are the record owners of the property, and by joining everyone who makes some claim we feel that, all necessary parties being before the court, the court can determine the equities if we are allowed to proceed upon the merits.

ARGUMENT AND AUTHORITIES.

So there is no question, it should be remembered, that we claim ownership of the securities or indebtedness forming the basis of our suit:

1. By assignment from the insurance commissioner of the State of New Mexico (see Exhibit C, Tr. pp. 51-53).

2. By the fact that we are the liquidating receiver appointed by the District Court of New Mexico, by an order adjudicating that "the assets are insufficient to pay the claims now filed," so the appellant was by an order vested with authority to bring this suit (Exhibit B, Tr. p. 50).

3. That the receiver of the Mississippi Valley Life Insurance Company was made a party defendant and he admits not only our lien and claim, but also our ownership of the lien, and further pleaded (referring to Ex-

hibit K, Tr. p. 77, under which the appellees, Republic Life Insurance Company, J. G. Vaughan, and M. J. Dougherty, must claim if any claim they have):

> "4. That he admits, as alleged in Paragraph XVI, the execution on May 18, 1932, of the contract, copy of which is attached to the bill of complaint and marked Exhibit 'K,' with the defendant, Republic Life Insurance Company of Dallas, Texas, in accordance with the order of the court dated May 18, 1932, in and by which said agreement said defendant agreed to assume the policy obligations of said Mississippi Valley Life Insurance Company, including the aforesaid registered policies issued by the National Life Insurance Company of the Southwest, but charging against each policy so assumed a lien in the amount of the whole legal reserve thereon, and avers that said contract did not purport to or as a matter of law did not affect or contemplate transfer of title to the property described in the bill of complaint, and further avers that said contract did not affect the rights and lien of the superintendent of insurance of the State of New Mexico but was intended to be a contract of reinsurance only in accordance with the tenor and effect thereof, as this defendant verily believes from the records" (Tr. pp. 21, 22).

And, also, we presented a petition (Tr. p. 3) on March 22, 1939 (Tr. p. 20), prior to filing the suit, and Judge Ling granted us leave to bring the suit.

It should also be remembered that:

1. This is a suit to foreclose an equitable lien of $32,000.00 on the property described in the bill of com-

plaint (Tr. p. 3), and we merely attempted to make all parties defendants who may assert some sort of a claim to the land, and those who have not disclaimed have admitted our lien, except the appellees, The Republic Life Insurance Company of Dallas, Texas, and M. J. Dougherty, who filed motion to strike (Tr. p. 84).

2. Nowhere does either of the appellees assert ownership of the land nor of the equitable mortgage unless it be through Exhibit K (attached to the complaint, Tr. pp. 77-83), and under the second clause of paragraph number three, which provides in substance that appellee, Republic Life Insurance Company of Dallas, recognizes that there are securities *now on deposit* with the insurance department of the State of New Mexico, and that the appellee shall be entitled to only the value of the reserves on the policies they assume, and then only *if the policyholders accept the assumption*, but then they are to have the reserves credited to it in such manner as the insurance department of the State of New Mexico shall approve (Tr. p. 80). But under Exhibit "K" all excess was to belong to the primary receiver of the Mississippi Valley Life Insurance Company, who was Alvin S. Keys, but is now H. B. Hershey, and who is before the court, and admitting our right of action and our ownership.

3. There is no pleading by appellee, Republic Life Insurance Company of Dallas, that they did assume any of the policies, nor that the policyholders accepted the assumption, nor do they plead any title, and we plead

they have no legal or equitable title to either the land or the lien (Tr. pp. 38-40).

4. That clause number three of Exhibit K (Tr. p. 79) charges them to make their claim to such securities, if any they have, in such manner as the insurance department of the State of New Mexico shall approve (Tr. p. 80).

5. It appears from Exhibit B (attached to the complaint, Tr. p. 50) by the title to the order in the receivership in New Mexico authorizing this suit, that both the defendant, H. B. Hershey, receiver of the Mississippi Valley Life Insurance Company, and also appellee, Republic Life Insurance Company of Dallas, Texas, were defendants in the suit in the District Court of the State of New Mexico, and are also parties herein, and are bound by the judgment of the District Court of New Mexico, holding it was necessary to liquidate this asset and authorizing this appellant to bring the suit.

We have covered this question by short references and citations in our opening brief (pages 21-25).

We think also:

(1) That Rule 9-a of the new Rules of Civil Procedure for District Courts of the United States gives us the right to sue and this rule also prohibits the appellees from raising the question except by answer.

(2) That Article 3727 of the Revised Code of Arizona, 1928, also gives us as the real party in interest the right to bring the suit.

(3) We are acting as a trustee only for the purpose of liquidating a specific fund and with reference to this fund we are in the nature of a trustee for the benefit of certain registered policyholders only, not for the general creditors nor holders of any other policy except those registered.

Restatement of Law says:

> "The trustee can maintain such actions at law or suits in equity or other proceedings against a third person as he could maintain if he held the trust property free of trust."
>
> Restatement of Trusts, Section 280, see particularly Section 280-h.

The Supreme Court of Texas says all securities deposited to secure policies are a special trust fund, and discussed the matter fully in an excellent opinion.

Phillips v. *Perue*, 111 Tex. 112, 229 S. W. 849:

This case has been reviewed by many courts, and all follow it.

See, also, the New York court's review of the case, *In re Phillips*, 200 N. Y. Supp. 639.

We are in the same position as the liquidating receiver whose actions were questioned by the commissioner of insurance of the State of Kansas, and by the State of Kansas, and in these cases Judge Bratton of the Tenth Circuit held that the court in the exercise of its equity powers can appoint a liquidating receiver to foreclose and the receiver was handling the securities deposited with the insurance commissioner in conjunction with

the reinsurer, both of whom are acting under the orders of the court.

Hobbs v. *Occidental Life, etc., Co.*, 87 F. (2d) 380:

In this case the Occidental was handling the securities subject to a court order and within the jurisdiction of the court appointing the liquidating receiver.

The Republic Life Insurance Company could do this by going into the District Court of New Mexico, in cause No. 14867, in the case of *Richard C. Dillon, for himself and others similarly situated, vs. George M. Biel, Superintendent of Insurance of the State of New Mexico, the Receivers of Mississippi Valley Life Insurance Company and The Republic Life Insurance Company of Dallas* (see Exhibit B, Tr. p. 50), and there ask for that which under their contract they are entitled, following the same procedure that Occidental Life Insurance Company did. If they would do this, we cannot see where the registered policyholders, the Mississippi Valley Life Insurance Company, the appellee, or anyone else, would lose, for we do not think this court would question the *bona fides* of the State District Court of New Mexico.

This position is quite fully discussed by Circuit Judge Bratton in *Kansas* v. *Occidental Life*, 95 F. (2d) 935.

In a case much like ours the United States District Court also held that the court in the exercise of its equitable jurisdiction will afford complete relief to all parties.

Holloway v. *Federal Res. L. I. Co.*, 21 Fed. Supp. 516.

Now, as we view the position of the Republic Life Insurance Company of Dallas, they desire, by setting up obstacles, to avoid that part of their contract requiring them to make representations to the insurance department of the State of New Mexico, and receive credit for any reserves to which they may show themselves entitled as provided by Exhibit K (Tr. p. 80), or make their claim in the state court so their rights to the securities can be determined.

Appellant feels the New Mexico court is the place for appellee to make its claim for the assets, if any it has, and not the Arizona courts.

In a case where the question of the rights of claimants of assets of an insolvent surety company were under consideration, it was so held, and Mr. Justice Brandeis said:

> "The court, which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto. It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction."
>
> *Lion Bonding & S. Co* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871, 880.

And he further held the state court has sole jurisdiction over the assets in their possession and the state court's action cannot be questioned except by an appropriate proceeding for that purpose.

The question as to the right of a receiver to liquidate assets deposited with the corporation commissioner was raised about as appellee questions appellant's right, and the Kansas court held that the liquidating receiver was the proper official to foreclose and liquidate them.

Meyers v. *Kansas State Corp. Com.*, 33 Pac. (2d) 308, 139 Kan. 890.

However may have been the ruling in the years past, and whether we are controlled by the case of *Boothe* v. *Clark* or the case of *Relf* v. *Rundle*, we hold title to the lien sued upon, which is not denied by anyone, and the Supreme Court of the United States, speaking through Mr. Justice Sutherland, in a case appealed from your court, said:

> "A foreign receiver may maintain such a suit, so far at least as the federal courts are concerned, where the title to the property in question has been vested in him by conveyance or statute, and especially where the receivership property has been assigned to the re-receiver by its owner, the suit is brought not strictly in his capacity as receiver by virtue of his appointment in another state, but in his capacity as assignee."

And in the footnote at the end of the decision is quite an annotation, which seems to settle any uncertainty, if there be one, for they say that:

> "It is to be observed that the decision in the reported case settles the question as to whether permitting a foreign receiver to sue under such circumstances is a matter of right or comity. Since the Supreme Court of the United States takes the view that

it is a matter of right, it follows that it is a right which will be protected under the full faith and credit clause of the Federal Constitution, under the doctrine of *Converse* v. *Hamilton,* 224 U. S. 243, 56 L. Ed. 749."

Oakes v. *Lake,* 290 U. S. 59, 78 L. Ed. 168.

We therefore say that there does not seem to be any question but what the plaintiff has a legal right in the United States District Court to bring this suit.

SECOND POINT.

The second assignment of error merely questions the right of John T. Watson, as liquidating receiver, to bring the suit to establish the lien and foreclose it, appellee contending:

1. We do not state amounts due the policyholders of the National Life of the Southwest.

ARGUMENT AND AUTHORITIES.

We covered this question in our opening brief, pages 25 to 28, and we feel the cases therein cited sufficiently cover our view, for we are of the opinion that when the District Court of New Mexico found in the judgment (Exhibit B, Tr. p. 50) that "the assets in hand of receiver were not sufficient to pay the debts," and ordered a foreclosure of this lien, it was binding on the appellee, who was made a party to the proceedings, and whether it appeared and contested or not makes no difference, it is bound the same as if the court would levy an assessment against a nonresident stockholder. That cannot be questioned any more than a stockholders' assessment made

in one state upon which a suit is brought in another state, as in the case of *Chandler* v. *Peketz,* 297 U. S. 609, 80 L. Ed. 881, in which case the Colorado courts sustained a demurrer to the receiver's suit, but the United States Supreme Court held that, even if the Colorado stockholder was not served with process in the Minnesota case, he could not collaterally question the order.

A very full and complete annotation on the "Conclusiveness of the assessment" and its "enforcibility in other states" we think will be helpful to the court.

See 80 L. Ed., pages 883-920.

Appellees state in their brief, page 24:

> "Appellant contends that neither liability nor the amount of liability need be stated in the complant because the order of Judge Chavez of the County Court of Santa Fe County, New Mexico, is conclusive. The order of Judge Chavez could not be conclusive against the appellees because they were not parties to the action in which the order was made. The cases cited by appellant have to do with stock assessments. There is no similarity between liability on a stock assessment and liability under a deposit for security."

We do not agree with appellees' position, for both assessments against stockholders and those against other debtors seem identical, for they are both the result of a judgment of a court in a receivership or insolvency proceeding.

Under their contract (Exhibit K) they are entitled to only such an amount of the New Mexico securities as

they may show themselves entitled by getting the registered policyholders to accept their assumption (Tr. p. 80), and no one knows whether any of those registered policyholders did "switch their policies" and accept Republic Life Insurance Company, and thus relieve the New Mexico deposit, except of course, the Republic Life Insurance Company themselves, and there is no showing in any pleading whether they made a claim or not, but if they have a claim it seems to us that orderly procedure would be to present it to the court where receivership is pending, as Mr. Justice Brandeis said in *Lion Bonding &. S. Co.* v. *Karatz,* 262 U. S. 77, 67 L. Ed. 871.

When the federal court assumes jurisdiction over mortgaged property, all matters in controversy can then be decided and the parties are bound by the judgment.

Trustee of an express trust a necessary party to foreclosure.

First Trust & S. Bank v. *Iowa-Wis. Bridge Co.,* 98 F. (2d) 416, cert. denied, 83 L. Ed. .....

The insurance commissioner is the trustee of an express trust holding the securities deposited by Mississippi Valley Life Insurance Company to secure registered policyholders under Section 71-155 of the New Mexico Statutes, 1929, and if there is any excess over the claims made, the court will unquestionably disburse it in accordance with the rights under the statute and the deposit agreement, except as may be changed by the reinsurance agreement, except as may be changed by the reinsurance agreement.

We therefore feel, for this error, the judgment of the district court should be reversed.

THIRD POINT.

The third assignment of error raises much the same questions raised by the first:

1. Complaint does not show any lawful right or ownership in plaintiff; or,

2. Authority to maintain this action.

ARGUMENT AND AUTHORITIES.

Appellant feels he has covered these questions under our opening brief (pages 28 to 31).

No one but Republic Life Insurance Company questions our lien or our right thereto, and nowhere do they say they have a good claim to either the lien or the land, and the question as to our right was disposed of, we think definitely, by *Oakes* v. *Lake,* 290 U. S. 59, 78 L. Ed. 168.

See, also:

Hopkins v. *Lancaster,* 254 Fed. 190.
Wright v. *Phillips,* (Cal.) 213 Pac. 288.

Appellee in its brief, pages 15-21, attempts to construe Exhibit K (Tr. p. 77), but we cannot see that section No. 3 means what appellees say, but we do think it is much like the reinsurance agreement examined by Mr. Justice Bradley, who stated the policyholders' position as follows:

> "Still the complainant might be without other remedy than that of accepting insurance in the new company, or of prosecuting the old and virtually de-

funct company, if it were not for the fund deposited with the Treasurer of Tennessee as indemnity to the citizens of that state holding policies in the company. The assignment of all its assets, by the old company to the new one, upon the consideration of its obligations being assumed by the new company, is somewhat analogous to an assignment of property by a debtor for the benefit of his creditors, in which only those creditors who are preferred or those who choose to come in and participate in the fund assigned, receive any benefit, whilst those who refuse to come in take no benefit, preferring to retain their claim against the debtor. So here, if the complainant does not choose to continue his insurance with the new company, he would have no remedy except against the old company, which is totally unable to respond, were it not for the fund which has been attached in the hands of the state treasurer of Tennessee. To this fund the complainant, being a citizen of Tennessee, had a right to resort. The object of the laws of Tennessee in requiring the fund to be placed on deposit with the treasurer was to protect and indemnify its own citizens in their dealings with the company. The assignment to the new company in Missouri could not deprive them of the right to this indemnity."

Lovell v. *St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 28 L. Ed. 423, 426.

As we view paragraph number three it is the duty of Republic Life Insurance Company to show whether or not there are any policies secured by the deposit with the insurance department of the State of New Mexico that have accepted their assumption. If not one policy-

holder did so we cannot see where they are entitled to any part of the securities, for it specifically provides the excess is to go to Alvin S. Keys, receiver (Tr. p. 80).

For this error, the judgment of the district court should be reversed.

FOURTH POINT.

The lien we allege is an equitable lien or mortgage against the property described.

Appellees cover this in their brief, pages 22 to 34.

This point we covered in our opening brief, pages 32-35.

ARGUMENT AND AUTHORITIES.

Appellees state on page 14 we do not allege what is due from the Wallaces.

We allege (Par. X, Tr. p. 33) that Two Republics Life Insurance Company fixed the amount at $32,255.00.

In Paragraph XIII (Tr. p. 35) we allege Wallaces' purchase and sale contract was a lien for $32,255.00, which was well known and understood by Mississippi Valley Life Insurance Company, and Paragraph X, H. B. Hershey, receiver, admits (Tr. p. 21).

In Paragraph XIV (Tr. p. 36) we allege that Mrs. Grace V. Wallace (now Mrs. Rowell, one of the defendants) confirmed and renewed the lien of the security in the amount of $32,000.00.

Exhibit E (Tr. pp. 55-61) shows the contract as $32,-255.00.

Mrs. Rowell in her answer (Tr. p. 89) admits the execution of Exhibit E and all the allegations of Para-

graph VII, and we think so far as the Wallaces are concerned it clearly shows that they were the purchasers of the property and there was unpaid $32,255.00.

And the receiver of Mississippi Valley Life Insurance Company also admits it.

The assignments, Exhibit F (Tr. pp. 62-64) and also Exhibit H (Tr. pp. 9-70) and also Exhibit J (Tr. pp. 75-77), show various amounts, one $30,000.00 one $32,000.00, and one $32,255.00, but this being a court of equity, the amount will be adjusted by the judgment, for the chancellor can adjust all equities, including the amount, and the rule cannot be stated any better than is stated in 19 American Jurisprudence, Section 163, page 151:

> "Such a lien may result by implication from a duty resting on the owner of property which is the subject matter of the lien, and the lien is completed by equity in pursuance of the maxim that 'that is deemed done that ought to be done.' The right of a grantor of lands to have established thereon a lien for unpaid purchase money is neither a legal lien nor an interest in the real estate; it is merely a right which is recognized in courts of chancery and which is based upon the consideration that the purchaser ought not to enjoy the property with immunity from his agreement to pay therefor. It has been held that where parties enter into an express agreement in writing, indicating an intention to make some particular property, real or personal, or a fund security for a debt or other obligation, an equitable lien is created on the property described in the contract."

And 10 Ruling Case Law, page 351, Section 100, says:

> "There are, however, certain liens, purely equitable in character as distinguished from statutory or common-law liens, which are cognizable only in a court of equity. Such a lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is implied and declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings. Thus, the right of a grantor of lands to have established a lien thereon for unpaid purchase money is neither a legal lien nor an interest in the real estate. It is a right merely recognized in courts of chancery in order to protect the very general equity that the purchaser shall not enjoy the property purchased with immunity from his agreement to pay therefor. Likewise, proceedings to foreclose mechanics' liens are in their nature equitable, and are necessarily governed by the rules pertaining to chancery practice."

Many times contracts must be adjusted in courts of equity, for clients do not always do a good job in drawing their papers, and the court is called upon to adjust the equities, as in this case. There is no question as to the intention of the Two Republics Life Insurance Company, the Mississippi Valley Life Insurance Company, the Wallaces, or the insurance department of the State of New Mexico, that there was a lien for unpaid purchase money, that it was on the property Wallaces were buying, and it was deposited with the insurance department of

New Mexico to secure the registered policyholders of the National Life Insurance Company of the Southwest, and we cannot see how anyone is hurt, for no party pleads, nor do we think they can plead or prove, that they are innocent purchasers, and therefore injured by the foreclosure.

Ruling Case Law says:

> "Likewise, a lien may be created by an equitable assignment of a contract, debt or fund. It is well settled that an agreement to charge, or to assign, or to give security upon, or to affect property not yet in the ownership of the party making the contract, constitutes an equitable lien which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract."
>
> 17 Ruling Case Law, page 604, Section 13.

We think Exhibit E (Tr. 55-61) and the other instruments constitute an equitable lien, for no doubt the Wallaces recognized the obligation, and so did Mississippi Valley Life Insurance Company.

Judge Baker of the Arizona Supreme Court said, in substance, where the parties show it is their intention to give security for a debt on certain property, however informally it may be expressed, equity will declare an equitable mortgage or lien to exist.

Stephen v. *Patterson,* 21 Ariz. 308, 188 Pac. 131.

C. J. Ross of the Arizona Supreme Court also recognized equitable mortgages and liens.

Gamble v. *Consolidated, etc., Bank,* 33 Ariz. 117, 262 Pac. 612.

Contracts much the same as ours have been discussed by the Arizona courts, and some hold them liens. The equities may be adjusted in foreclosure, and some seem to indicate rescission can be had.

Coffin v. *Green,* 185 Pac. 361.
Treadway v. *Western, etc., Co.,* 10 Pac. (2d) 371.

But none go so far as to allow a purchaser to keep the property without paying that which he admits was not paid.

United Farmers Market v. *Donafrio,* 29 Pac. (2d) 144, Point 9.

This is much better treated in Ruling Case Law, under the title "Equitable Mortgages."

19 Ruling Case Law, page 273 *et seq.,* Sections 44, 45.

On page 34 appellee questions our statement with reference to the foreclosure of the John R. Wallace tract in the United States District Court for the District of Arizona. John R. Wallace and James Q. Wallace were brothers. M. J. Dougherty drew both contracts and they were identical with Exhibit E (Tr. 55), complaint being filed on this contract on July 10, 1929, in cause E-193, Phoenix, and on June 25, 1931, judgment of foreclosure was signed, and thereafter the United States marshal sold the property and it was bought in by M. J. Dougherty for the Mississippi Valley Life Insurance Company. Reference to the assignments, Exhibit F (Tr. 63) and Exhibit H (Tr. 69) shows both liens handled by Two Re-

publics Life Insurance Company, and we think that appellee is in error as to his statement.

We think the district court should have held that we have plead an equitable mortgage or lien, and compelled the appellees to answer to the merits, as required by Rules 8 and 9 of Rules of Civil Procedure, as the real obligors of the lien recognize it, and the court of equity can then adjust everyone's rights therein.

FIFTH POINT.

Is our action barred by limitations or laches?

This is covered by appellees' brief, pages 34 to 41.

We have briefed the question in our opening brief (pages 35 to 41) and we ask consideration thereof.

ARGUMENT AND AUTHORITIES.

We think this question should be raised by affirmative pleading, as stated in Rule 8-c, and not by a "speaking demurrer."

The defendants who owe the money do not plead limitations, that is, Mississippi Valley Life Insurance Company or Mrs. Rowell (Mrs. Wallace).

There is no showing that Republic Life Insurance Company of Dallas has an agent within the State of Arizona, and whether they are or are not the debtor, they do not have the legal right to set up by motion this defense, and no one other than Republic Life Insurance Company attempts to raise the issue, and they are absent from the state under Article 2066, Revised Statutes of Arizona, 1928.

Appellees in their brief (p. 37) say they have searched diligently and cannot find a case holding Republic Life Insurance Company could not plead limitations. We call their attention to:

Nevada, etc., Co. v. *Berryhill,* (Nevada) 75 Pac. (2d) 992.

Hale v. *St. Louis & S. F. Ry.,* (Okla.) 134 Pac. 949.

O'Brien v. *Big Casino, etc., Co.,* 9 Cal. App. 283, 99 Pac. 209.

The federal courts adhere to the doctrine of laches, and as Justice Kenyon said, if the delay is not prejudicial no one is injured, as it is to aid justice, not defeat it.

Spiller v. *St. Louis & S. F.,* 14 F. (2d) 284.

The Circuit Court of Appeals, Fourth Circuit, discussed this in *Hall* v. *Ballard,* 90 Fed. 939, and so did Justice Philips of the Tenth Circuit: *Standard Oil Co.* v. *Standard, etc., Co.,* 72 F. (2d) 524, cert. denied.

There must be inexcusable delay, and it must result in prejudice to the defendant.

There can be no prejudice by any delay and Mrs. Rowell (Mrs. Wallace) in her answer admitted the obligation was extended two years from January 16, 1931 (Clause V, Tr. p. 90), making January 16, 1933, and suit was filed March 22, 1937 (Tr. p. 20). However, if this cannot be raised, except as provided by the Rule 8-c of Code of Civil Procedure, the court committed error if the demurrer was sustained on the fifth ground.

Summary.

In closing, allow appellant to say that we feel we are trustees of an express trust, holding title to the equitable

lien for only one definite purpose, to liquidate the securities deposited with the insurance department of the State of New Mexico, for the benefit of the registered policyholders of the National Life Insurance Company of the Southwest, and no party, whether in this suit or in New Mexico, has any right to divert the securities to any other purpose.

Appellant is trustee and comes within Rule 9-a of the Rules of Civil Procedure and has a right to sue in this court to foreclose the equitable mortgage sued upon.

Appellee takes the position that the case of *Booth* v. *Clark,* 17 Howard 322, prohibits our suit. We say we are governed by *Relf* v. *Rundle,* 103 U. S. 222, and have the right to sue, and we back it up by *Oakes* v. *Lake,* 290 U. S. 59.

Appellees on page 8 of their brief say:

> "We do not question that a statutory receiver who acquires title by virtue of a statute, may ordinarily sue in a foreign jurisdiction, or that a trustee of an express trust may sue in his own name. Such is the holding in *Relf* v. *Rundle,* 103 U. S. 222, and *Bernheimer* v. *Converse,* 206 U. S. 516, cited by appellant. We contend, however, that the record does not show appellant to be either a statutory receiver, an owner, or a trustee of an express trust."

In *Relf* v. *Rundle* the Supreme Court said of the insurance commissioner:

> "He is the trustee of an express trust, with all the rights which properly belong to such a position, etc."

Restatement says:

> "An interest held by a trustee, as such, may be transferred by him to a successor trustee, although such an interest, if held by a person for his own benefit, would not be transferable."
>
> Restatement of Law of Trusts, Section 111.

And Section 280 of Restatement of Trusts says we may sue on them and not necessary to describe himself as trustee.

> Restatement of Law of Trusts, Section 280-h.

The Arizona statutes also give that right.

Holding as trustee an assignment of the lien from the statutory trustee and also authority of the district court to bring this suit, and having possession of the security, we should come within *Oakes* v. *Lake,* and should have the right to sue, and we stand exactly under the reasoning of the court in *Hobbs* v. *Occidental Life,* 87 F. (2d) 380.

The Missouri laws, like those of New Mexico, fail to provide for liquidation by the insurance commissioner, and Judge Reeves of the Western District of Missouri, in a situation about like ours, said:

> "It becomes the duty of the court to direct the collection by its receiver of all the assets of the company, so that same can be equitably and properly applied to the discharge of the obligations of said company. The court alone is capable of determining what priorities, preferences and liens may be allowed and enforced against such assets. The responsibility of the superintendent of insurance as an executive of-

ficer is completely discharged when a court whose duty it is to administer the estate, calls for a surrender and delivery of said assets."

Holloway v. *Federal Reserve, etc., Co.,* 21 Fed. Supp. 516, 518.

We also filed a petition for leave to bring this action (Tr. p. 3) and it was filed in this cause on March 22, 1937 (Tr. p. 20), and we do not understand why it was filed unsigned nor why the transcript shows no order was entered, but the writer of this brief knows it was presented to Judge Ling and after hearing he granted appellant leave to file our first bill of complaint. We therefore feel we are properly in court and should have the right to proceed on the merits.

In addition to the case of *Oakes* v. *Lake,* we think the Good case is helpful.

"* * * Thus we have statutory receivers as distinguished from chancery receivers; but this distinguishing feature does not of itself determine the receiver's right to sue in a foreign jurisdiction. This right depends entirely upon whether or not the statute gives him the power. What is SUFFICIENT POWER for this purpose has been well settled as BEING A TITLE to the property vested in the receiver as ASSIGNEE or as statutory successor of the insolvent corporation (citing cases. Italics ours)." And they overruled the demurrer and sustained the receiver's action.

Good v. *Derr,* 46 F. (2d) 411, cert. denied, 75 L. Ed. 1457.

See, also: *Friede* v. *Sprout,* 2 N. E. (2d) 549 (Mass.).

Appellees make this statement in their brief, page 37:

> "In the case at bar the Wallaces (the alleged debtors under the escrow contract) were at all times residents of Arizona. The appellee, *Republic Life Insurance Company, and the appellee, J. G. Vaughn, were in nowise obligated under the contract and the only necessity of their being made parties is that they obtained an interest in the property subsequent to the date of the alleged equitable mortgages.* The Wallaces have been amenable to personal service at all times and the Republic Life Insurance Company and Vaughn have been amenable to substituted service which is sufficient to test their rights to the property if, as alleged by appellant, their rights are subject and subordinate to the appellant's alleged lien."

If this statement is true, why should they not answer, and try out their right, if they "obtained an interest in the property subsequent to the date of the alleged equitable mortgage."

Under this statement they are necessary parties to the foreclosure, and they must take the title as they found it.

Appellant, therefore, asks that upon due consideration of all matters in controversy, that this court reverse the judgment of the Honorable District Court of Arizona, and overrule the motions to strike, and enter such orders herein as in their judgment they think are right and necessary in the premises, for which they pray.

That G. W. Silverthorne and Kent Silverthorne of 311 Phoenix National Bank Building, Phoenix, Arizona, are

attorneys for appellees, and a copy of this reply brief is being mailed to them.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 9243.

JOHN T. WATSON, LIQUIDATING RECEIVER OF AND FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW MEXICO, APPELLANT,

VS.

REPUBLIC LIFE INSURANCE COMPANY OF DALLAS, TEXAS, A CORPORATION, H. B. HERSHEY, RECEIVER OF MISSISSIPPI VALLEY LIFE INSURANCE COMPANY, R. E. O'MALLEY AND WILLIAM E. CAULFIELD, RECEIVERS, J. G. VAUGHAN, M. J. DOUGHERTY, GRACE V. ROWELL, FORMERLY GRACE V. WALLACE, WILLIAM H. WALLACE, A MINOR, ANNA LOUISE WALLACE, A MINOR, R. L. DANIEL, CHAIRMAN OF THE BOARD OF THE INSURANCE COMMISSION OF THE STATE OF TEXAS, APPELLEES.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Chief Justice and Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the appellant, by his attorneys, and respectfully shows unto the court:

That on April 1, 1940, this court, acting through Circuit Judges Garrecht, Haney and Stephens, handed down an opinion in the above cause, affirming a judgment of the United States District Court for the District of Arizona, in which the appellant says the court erred, and now moves the court to grant a rehearing of this cause, and if possible a reargument, to the end that the issues may be cleared, and as grounds therefor respectfully shows:

Principal Ground: The court's holding that the transaction relied on for recovery did not create a lien upon the land in question, but only the right to collect the balance due on the executory contract of sale, is based upon misapprehension as to the real derivation of the lien asserted as to plaintiff's theory of recovery, and as to the true nature of the cause of action, and more particularly:

(1) The lien asserted is derived, not from the executory contract of sale, but from an assignment of all right, title and interest by the holder of the legal title to the land.

(2) Mississippi Valley Life Insurance Company, vendor in the executory contract, and holder of legal title to the land, could and did create a lien on the land, subject of course to the Wallace equity.

(3) This is not a suit to foreclose the equity of the vendees; it is a suit to establish a lien on the vendor's interest in the land, and to sell that interest, subject of course to the Wallace equity, to satisfy the claims of holders of registered policies.

Certificate of Counsel: The subscribing attorneys for the appellant hereby certify that this petition for rehearing is presented in good faith, in the belief that it possesses merit, and not for any purpose of delay.

That Silverthorne & Silverthorne, whose post-office address is Phoenix National Bank Building in Phoenix, Arizona, are attorneys for the appellees, Republic Life Insurance Company of Dallas, Texas, J. G. Vaughan and M. J. Dougherty, and three copies hereof are being mailed to them in the same mail carrying these.

Appellant submits herewith his brief and argument to sustain the above grounds for rehearing, and asks the court, in view of the above, to grant him the privilege of argument hereon.

Francis C. Wilson,

Post-office Address:
Sena Plaza,
Santa Fe, New Mexico,

John C. Watson,

Post-office Address:
Sena Plaza,
Santa Fe, New Mexico,

Fred C. Knollenberg

Post-office Address:
415 Caples Building,
El Paso, Texas,

Attorneys for Appellant.

BRIEF AND ARGUMENT IN SUPPORT OF THE MOTION FOR REHEARING.

Unfortunately, this simple case has become confused. The counsel here petitioning are by no means free from fault. But in a case involving such strong equities, we trust that the court need not visit punishment for the derelictions of counsel upon the policyholders represented. We crave the court's indulgence for a deferential effort so to dispel the confusion as to lead to a different result than that heretofore announced.

While we have particularized three points of confusion, as we see it, this argument will be so brief that we feel it unnecessary to discuss them separately.

This court has been at pains to determine and state the legal relation that resulted from the executory contract between Two Republics Life, as vendor, and the Wallaces, as vendees, of the land in question. It is held that this executory contract did not pass a title to the vendees, the Wallaces; and that the legal title continued to reside in the vendor, Two Republics Life.

That is and has been our own view of the resulting relation. In fact, it is the fundamental point in our theory. Two Republics and its successors, Mississippi Valley Life, owned this land, in legal title. So owning the land, they could put a lien on it. And that is what we contend they did.

This court misconceives our position and theory in attributing to us (Op. p. 7) a contention that the contract between Two Republics and the Wallaces constituted an equitable mortgage. It is the assignment of the vendor's interest in that contract and in the land itself, that constitutes the equitable mortgage.

Why do we inquire into the relation that subsists between the vendor and the vendee in an executory contract to sell realty? Simply to ascertain what interest adheres to the vendor. For it is the vendor's interest that was assigned to us. We can claim nothing under the vendees. They never assigned to us. And of course when the vendor assigned to us, we took subject to any rights and interests the vendees had.

If this be clear, it follows that we are in accord with the court's statement that "the grantee (here the Wallaces, vendees) had no interest in the realty to which a lien in favor of the grantor (here Mississippi Valley Life, the vendor) could attach." Certainly, as the court also says, "appellant's predecessor did not succeed to a lien."

But, again, our lien does not derive from the Wallaces. It derives from Mississippi Valley Life, which corporation, as we understand the opinion and as we earnestly contend, held the legal title. Surely the legal owner could put a lien upon the land.

We now deferentially direct attention to this passage (Op. p. 8):

> "There being no lien on the land it is apparent that upon assignment of the contract by the

> vendor (Two Republics) to the New Mexico superintendent of insurance, the latter obtained none, but only 'the right to collect the balance due thereon.' "

Is not this a *non sequitur?* Is it not inconsistent with the court's basic holding?

True, the Two Republics did not "succeed to" and did not have a lien on the land. But it had something vastly better. It had the legal title. True, the Two Republics did not and could not *make over* to the superintendent of insurance a lien it did not have. But it could do and did something simpler yet. It *created* a lien in favor of the superintendent on the legal title it did have.

And the lien in favor of the superintendent of insurance created by the Mississippi Valley Life's assignment (Ex. J) was in the nature of an equitable mortgage. Mississippi Valley Life owned the land in legal title. It *sold, assigned* and *transferred* all its *right, title and interest in and to* the Wallace security. Its right, title and interest in the Wallace security was legal title to the land. True, that embraced the right to collect the balance on the contract. But it included more. It included continued legal ownership until final payment made. Under the escrow arrangement, it included the right to demand and have the already executed and deposited quitclaim, in case the Wallaces should default. It included everything except the possessory right of the Wallaces so long as they continued to pay, and the equity of the Wallaces to a specific performance.

The Mississippi Valley Life, having transferred to the superintendent "all" of its right, title and interest, how can it be said that the superintendent got only a part of it, the right to collect accruing payments?

Now this assignment, though covering the entire title and interest of the Mississippi Valley Life, was not an absolute transfer. It was made for the purposes of security. The assignment recites the conditions. It was an intended compliance with state requirements as to registered policies. It was to remain effective while the security (the Wallace contract) remained on deposit. The security assigned was to be used "for the purpose of fully protecting any and all holders of policies so registered." The superintendent was "to have and to hold said security for the purpose of satisfying just claims of any policyholder in case of possible default of said first party in the matter of satisfying the same." We cannot see how this transaction can be anything less or other than an equitable mortgage on the land.

The Mississippi Valley Life reserved nothing from this pledge of its property. The "security" still remains on deposit. It is needed for the protection of the holders of registered policies. There has been default by the pledgor. The intention is plain that in case of default the superintendent of insurance should stand in the shoes and have every right of the pledgor. And that is all we ask. The pledge, it seems to us, must go to the land itself. It is quite immaterial that, by keeping up and completing the payments, the Wallaces could or might get the legal title. That did not

prevent the owner from pledging what he had; it does not prevent us from enforcing the pledge for what it may be worth. The pledge is all embracing. Our lien is as broad as the pledgor's title. It remains attached to the land until the Wallaces or their assigns qualify to take the title.

Such is our theory of the lien and of the cause of action. It does not touch and is not concerned with the interest of the vendees in the contract or their equity in the land. We can see nothing to prevent a sale of this land under foreclosure decree, subject to equities of the vendees. If defendant, Republic Life of Dallas, had not intruded, it would have been simple enough. Its intrusion seems to have brought confusion.

It happens that defendant, Republic Life of Dallas, came into the picture, through its man Banta, in two capacities. First, through the proceedings set forth in the complaint, it secured a quitclaim from Pelsue, the Arizona receiver of the Mississippi Valley Life. That carried the vendor's interest in the contract and the land. That interest, for reasons stated in the complaint, it acquired subject to our lien. Second, at practically the same time Republic Life of Dallas also acquired the vendees' interest in the contract and its equity in the land. At least it attempted to do so through a warranty deed from Mrs. Rowell, the surviving Wallace.

This transfer of the Wallace interest to Republic Life of Dallas did not change our situation in the slightest. It was open to anyone to acquire that interest. Whoever acquired it would have the payments to make,

or would eventually be defaulted and forfeited or foreclosed out. If we ever had a lien on the vendor's interest and a right to foreclose it, as seems unescapable, those rights could not be affected by a change of ownership of the vendees' interests.

But the dual interests and capacities of defendant Republic Life of Dallas, aids confusion. Counsel have persistently contended as if this were a suit to foreclose and sell the Wallace interest for default in payments. It is not. No default on the part of the vendees is alleged in the complaint. It is not shown what payments they may have made or how much they may still owe. This suit goes to the vendor's interest, and goes to the defendants in their capacity as claimants of that interest. To sell that interest would not touch or affect the interests or rights of these same defendants as successors to the Wallaces, any more than their acquirement of the Wallace interests affected our lien on the vendor's interest. It would simply cut off their claim of legal title to the land as successor of Mississippi Valley Life.

Our complaint has perhaps aided the confusion. It is not a model of clarity and precision. It may not run always true to the theory here stated. In zeal to give the court the whole picture, we may have alleged surplusage. The prayer might have been more plainly limited as going only to the vendor's interest. But none of that is of the substance. The complaint has not been attacked on such grounds. It is challenged as not stating a cause of action. We submit that it does.

It lacks nothing, we believe, of a cause of action to foreclose a lien in the nature of an equitable mortgage created by the owner of the land. We claim no interest on the vendees' interest in the contract, and do not seek to foreclose as against that interest.

In closing, may we say that if the court should come to agree with our position as here stated, there would still be no necessity of interpreting the New Mexico statute (L., 1909, N. M., Ch. 48, Sec. 38). Regardless of its meaning and scope, we have here a lien by contract, under the authorities cited in our brief, filed pursuant to the court's direction, particularly *State* v. *Am. Bonding & Cas. Co.*, 206 Ia. 988, 221 N. W. 585; *In re New Jersey Fid. & Plate Glass Ins. Co.*, 15 N. J. M. 384, 191 Atl. 475.

Respectfully submitted,

FRANCIS C. WILSON,
Post-office Address:
Sena Plaza,
Santa Fe, New Mexico,

JOHN C. WATSON,
Post-office Address:
Sena Plaza,
Santa Fe, New Mexico,

FRED C. KNOLLENBERG,
Post-office Address:
415 Caples Building,
El Paso, Texas,

Attorneys for Appellant.

No. 9244

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC FREIGHTERS COMPANY,
a Corporation,

Appellant,

vs.

ST. PAUL FIRE and MARINE INSURANCE COMPANY,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9244

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

PILLSBURY, MADISON & SUTRO, Esqrs.,
FELIX T. SMITH, Esq.,
Standard Oil Bldg.,
San Francisco, Calif.
Proctors for Appellant.

NATHAN H. FRANK, Esq.,
IRVING H. FRANK, Esq.,
311 California St.,
San Francisco, Calif.,
Proctors for Appellee.

In the Southern Division of the United States District Court for the Northern District of California. Division One.

No. 17274

ST. PAUL FIRE & MARINE INSURANCE CO., a Corporation,

Libelant,

vs.

PACIFIC FREIGHTERS COMPANY, a Corporation,

Respondent.

To the Honorable Maurice T. Dooling, Judge of the Southern Division of the United States District Court for the Northern District of California. Division One:

THE LIBEL

of St. Paul Fire & Marine Insurance Co., a Corporation, against Pacific Freighters Company, a Corporation, in a cause of General Average, civil and maritime, alleges:

I.

That at all times hereinafter mentioned, St. Paul Fire & Marine Insurance Co., libelant above named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and having an agency and doing business in the City and County of San Francisco, State of California.

II.

That at all times hereinafter mentioned, Pacific Freighters Company, respondent above named, was, and still is, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City and County of San Francisco, in said State, [1*] and at all of said times was the owner of the American Schooner "Rosamond."

III.

That at all times hereinafter mentioned, Smith, Kirkpatrick & Co., Inc., was, and still is, a corporation, organized under and by virtue of the laws of the State of New York.

IV.

That in the month of May, 1920, Messrs. Comyn, Mackall & Co. shipped on board the said schooner "Rosamond", at the port of Port Blakeley, Washington, a cargo of lumber to be by said vessel transported from said port of Port Blakeley, Washington, to Cape Town, South Africa, and said Comyn, Mackall & Co. then and there sold and transferred said cargo to said Smith, Kirkpatrick & Co., Inc., who at all of the times herein mentioned were the owners of the said cargo.

V.

That thereafter said vessel sailed from the said port of Port Blakeley, Washington, with said lum-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

ber on board, for said port of Cape Town, South Africa, and while on said voyage experienced heavy gales, which caused said vessel to leak and to jettison her deck cargo; that in consequence thereof it became necessary for the safety of said vessel and the remaining cargo, for said vessel to square away for a port of distress, which she then and there did, and arrived at the port of San Francisco on or about the 16th day of May, 1920.

That on the arrival of said vessel at the port of San Francisco it became necessary to discharge the said cargo and place said vessel in dry dock for repairs. That upon said repairs being completed, the said cargo was re-loaded, and a new cargo taken on board to replace the deck load which had theretofore been jettisoned and lost. [2]

VI.

That under and by virtue of the contract of affreightment under which said cargo was being transported, the freight on said first cargo was prepaid and considered as earned on the completion of the loading thereof. That for the new cargo taken on board at the port of San Francisco as aforesaid, the said vessel received a new and additional freight amounting to the sum of Twenty-one Thousand One Hundred and Nineteen ($21,119.00) Dollars.

VII.

That the said vessel thereupon proceeded upon her voyage and arrived at the port of Cape Town,

South Africa, on the day of 192 , and safely delivered her said cargo.

VIII.

That the said vessel and the said cargo remaining on board thereof, after said jettison and at the time the said vessel changed her course for the port of distress, are liable to contribution in general average ratably for the cost and expense of putting into said port of distress and repairing said vessel, and such other expense incurred until she was again upon her voyage to the port of Cape Town, South Africa, and they are likewise entitled to be credited pro rata for the extra freight received by said vessel at said port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned.

IX.

That the valuation of said vessel, less the cost of repairs, is the sum of Forty-six Thousand Six Hundred Forty-two and 99/100 ($46,642.99) Dollars.

X.

That the value of said cargo remaining on board after the jettison of the said deck load and at the time of the changing [3] of the course of said vessel for said port of distress, is the sum of Sixty-one Thousand Six Hundred and Sixty-two (61,-662.00) Dollars.

XI.

That the expense of said deviation and cost of repairs aforesaid, is the sum of Eight Thousand Three Hundred Seventeen and 62/100 ($8,317.62) Dollars.

XII.

That the freight received by said vessel as a result of putting into said port of distress, is the sum of Twenty-one Thousand One Hundred and Nineteen ($21,119.00) Dollars.

XIII.

That the amount of contribution in general average which said vessel should pay to said cargo is estimated at the sum of Seven Thousand Two Hundred and Twenty-four and 72/100 ($7,224.72).

XIV.

That heretofore, and before the commencement of this action, said Smith, Kirkpatrick & Co., Inc., for a good and valuable consideration, duly assigned to this libelant all of its (the said Smith, Kirkpatrick & Co., Inc.) right, title and interest in and to all of the moneys due or to become due to it from the said vessel, its owners, or other parties interested in said general average.

XV.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that a citation in due form of law according to the practice of this Honorable Court in cases [4] of admiralty and maritime jurisdiction, may issue against the said Pacific Freighters Company, a Coporation, and that it may be required to appear and answer on oath this libel and the matters therein contained, and that this Honorable Court will be pleased to decree to the libelant the payment of said general average contribution amounting to the sum of Seven Thousand Two Hundred and Twenty-four and 72/100 ($7,224.72) Dollars, with interest and costs, and that said libelant may have such other and further relief as in law and justice it may be entitled to receive.

SAINT PAUL FIRE AND MARINE
INSURANCE COMPANY,
By M. C. HARRISON

NATHAN H. FRANK
IRVING H. FRANK
Proctors for Libelant,
1215 Merchants Exchange Bldg.,
San Francisco, Cal.

State of California,
City and County of San Francisco—ss.

M. C. Harrison, being first duly sworn, deposes and says: That he is the Agent for Saint Paul Fire and Marine Insurance Company, a Corporation, Libelant in the above entitled cause, and as such

Agent is authorized to make this verification for and on behalf of said libelant; that he has read the foregoing Libel, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

M. C. HARRISON

Subscribed and sworn to before me this 13th day of July 1921.

[Seal] C. M. TAYLER

Deputy Clerk United States District Court, Northern District of California.

[Endorsed]: Filed Jul. 13, 1921. [5]

[Title of District Court and Cause.]

ANSWER.

The answer of Pacific Freighters Company, a corporation, respondent above named, to the libel of St. Paul Fire & Marine Insurance Co., a corporation, on file herein, admits, denies and alleges as follows:

I.

Admits the allegations of Articles I, II and III of said libel.

II.

Answering Article IV of said libel, respondent admits that in the month of May, 1920, Messrs.

Comyn, Mackall & Co. shipped on board the said schooner "Rosamond", at the port of Port Blakeley, Washington, a cargo of lumber to be by said vessel transported from said port of Port Blakeley, Washington, to Cape Town, South Africa, and said Comyn, Mackall & Co. then and there sold and transferred said cargo to said Smith, Kirkpatrick & Co., Inc., but denies that at any of the times therein mentioned subsequent to the sale hereinafter set forth said Smith, Kirkpatrick [6] & Co., Inc., were the owners of the said cargo, and in this behalf alleges: That a short time thereafter, the precise date being unknown to respondent, said Smith, Kirkpatrick & Co., Inc., sold and transferred said cargo to Small & Morgan, a copartnership doing business in the City of Cape Town, South Africa.

III.

Admits the allegations of Article V.

IV.

Answering Article VI, respondent admits that under and by virtue of the contract of affreightment under which said cargo was being transported, the freight on said first cargo was prepaid and considered as earned on the completion of the loading thereof, but denies that for the new cargo taken on board at the port of San Francisco as aforesaid, the said vessel received a new and additional freight amount to the sum of twenty-one thousand one hundred nineteen dollars ($21,119.), or any sum in

excess of ten thousand dollars ($10,000.); and in this behalf alleges that in order to proceed on said voyage and to earn said new and additional freight, respondent necessarily expended the sum of thirty thousand, one hundred ninety-six and 28/100 dollars ($30,196.28) over and above the expense of deviation and cost of repairs mentioned in Article XI of said libel.

V.

Admits the allegations of Article VII.

VI.

Answering Article VIII admits that the said vessel and the said cargo remaining on board thereof, after said jettison and at the time the said vessel changed her course for the port of distress, are liable to contribution in general average ratably for the cost and expense of putting into said port of [7] distress and repairing said vessel, and such other expense incurred until she was again upon her voyage to the port of Cape Town, South Africa, but denies that they are likewise, or at all, entitled to be credited pro rata or otherwise for the extra freight, or any freight, received by said vessel at said port of distress, or at any place, as the result of the substitution of the new cargo, or any cargo, for that portion of the cargo which had been jettisoned, or any other cargo, or otherwise or at all.

VII.

Admits the allegations of Articles IX, X and XI.

VIII.

Answering Article XII, denies that the freight received by said vessel as a result of putting into said port of distress, is the sum of twenty-one thousand, one hundred nineteen dollars ($21,119.), or any sum, and denies that the vessel received any freight as a result of putting into said port of distress.

IX.

Answering Article XIII, denies that the amount of contribution in general average which said vessel should pay to said cargo is estimated at the sum of seven thousand, two hundred twenty-four and 72/100 dollars ($7,224.72), or any sum, and denies that any sum or contribution in general average should be paid by said vessel to said cargo.

X.

Answering Article XIV, alleges that it has no information as to the matters therein contained, and for that reason demands strict proof thereof.

XI.

Answering Article XV, denies that all and singular the premises are true, or within the admiralty or maritime jurisdiction of the United States or of this Honorable Court. [8]

And for a further and separate defense, respondent alleges:

That on the 15th day of March, 1920, and upon the delivery of said cargo, said Small & Morgan

agreed in writing with respondent that all losses and expenses which by way of general average on account of said voyage should be made to appear to be due from them, should be stated by Geo. E. Billings Co., and would be paid by them to said Geo. E. Billings Co.; that a copy of said average agreement is hereunto annexed and marked Exhibit "A"; that in accordance with said agreement, said Geo. E. Billings Co. on May 14, 1921, stated said amounts and determined that there was due from said cargo the sum of four thousand, six hundred ninety-four and 22/100 dollars ($4,694.22); that copies of said statement were thereupon delivered to said Smith, Kirkpatrick & Co., Inc., and libelant, and that neither said Smith, Kirkpatrick & Co., Inc., nor said libelant nor said Small & Morgan has ever notified said Geo. E. Billings Co., or respondent of any objection to said statement.

Wherefore, respondent prays that it be hence dismissed with its costs of suit.

PILLSBURY, MADISON & SUTRO
Proctors for Respondent. [9]

State of California,
City and County of San Francisco—ss.

R. H. Holmberg, being first duly sworn, deposes and says: That he is the Secretary of Pacific Freighters Company, a corporation, the respondent in the above entitled cause, and as such Secretary is authorized to make this verification for and on behalf of said respondent; that he has read the fore-

going Answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and that as to those matters he believes it to be true.

R. H. HOLMBERG

Subscribed and sworn to before me this 26th day of August, 1921.

[Seal] FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California. [10]

EXHIBIT "A".

Geo. E. Billings Co.
Average Adjusters and
Insurance Brokers
308-312 California Street
San Francisco
Represented by
Mather & Co.
Philadelphia, New York,
Boston and Seattle

AVERAGE AGREEMENT.

Whereas, the Scho. "Rosamond" whereof J. H. Brown was Master, having on board a cargo consisting principally of Lumber, sailed from Puget Sound on or about the 15th day of March, 1920, bound for Cape Town, and, in the due prosecution

of her said voyage, it is alleged that suffered heavy weather and put into San Francisco for the safety of the vessel and cargo.

And whereas, by reason of the occurrences of the voyage, certain losses and expenses have been incurred, and other losses and expenses may hereafter be incurred, which may be a charge (by way of General Average or otherwise) upon the said Vessel, her earnings as Freight, and her Cargo, or either of them, or upon specific interests;

Now, in consideration of the premises, we, the subscribers (Charterers, owners, shippers, or consignees, of the said Vessel, her earnings as Freight, or her Cargo; or agents or attorneys of charterers, owners, shippers, or consignees, of the interest described and set opposite our signatures), do hereby severally and respectively (but not jointly, or one for the other) covenant and agree (for ourselves personally, our principals, and for our and their respective successors, executors, and administrators), to and with The Pacific Freighters Co. and/or Geo. E. Billings Co. (as Trustees for all concerned), that all losses and expenses aforesaid which shall be made to appear to be due either from us, our principals, or from any firm of which we are or have been co-partners, whether as charterers, owners, shippers, consignees, or as subscribers hereof, shall be paid unto the said Geo. E. Billings Co. (as Trustees for all concerned) by us respectively according to the part or share in the said

Vessel, her earnings as freight, or her Cargo, which either belongs to us, belongs or is consigned to, or is for the account of, any person or persons for whom we are agents or attorneys, or with whom we are or have been co-partners, or in which we are or have been in any manner concerned, provided that such losses and expenses shall be stated and apportioned in accordance with the established usages and laws in similar cases, and such payment shall be made upon the completion of the statement of such losses and expenses, and upon due notice being given of the completion thereof.

And we do further bind ourselves to furnish promptly (upon request of said Adjusters) all such information and documents as they may require from us respectively to make said adjustment; and we warrant that the information furnished will be correct.

And should the value of services rendered in whole or in part to cargo be determined either by amicable settlement or by arbitration, we hereby severally agree to pay each our rateable proportion of any sum thus fixed or determined upon; and in the event of an action or suit being brought to recover for or determine the value of such services, we hereby severally agree to give bond therein in the same manner as if the person or persons by whom suit is brought had required such bond direct from us before surrendering the cargo; and we further severally agree to pay and fully satisfy any final decree that may be rendered.

This agreement may be executed in several parts of like tenor, the whole of which shall constitute but one agreement and shall have the same effect as if each of said parts were severally signed by us.

In Witness Whereof, we have to these presents set our hands, in the City of Cape Town Union of South Africa this 20th day of November in the year of our Lord, One Thousand Nine Hundred and Twenty.

Signatures—Small & Morgan.

No. of Packages and Description—11307 pcs. Douglas Fir and/or rough Clear Spruce.

Amount of Invoice—$61661.71. Full particulars and original invoices will be sent you later (direct).

Where insured—Saint Paul Fire Marine Insurance Co. of Saint Paul, Minnesota. [11]

[Endorsed]: Admission of service. Filed Sep. 2, 1921. [12]

[Title of District Court and Cause.]

CROSS-LIBEL.

To the Honorable Maurice T. Dooling, Judge of the Southern Division of the United States District Court for the Northern District of California. Division One:

The cross-libel of Pacific Freighters Company, a corporation, against St. Paul Fire & Marine Insurance Co., a corporation, in a cause of general average, civil and maritime, alleges:

I.

That at all times hereinafter mentioned, St. Paul Fire & Marine Insurance Co., cross-respondent above named, was and still is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and having an agency and doing business in the City and County of San Francisco, State of [13] California.

II.

That at all times hereinafter mentioned, Pacific Freighters Company, cross-libelant above named, was, and still is, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business at the City and County of San Francisco, in said State, and at all of said times was the owner of the American Schooner "Rosamond."

III.

That at all times hereinafter mentioned, Smith, Kirkpatrick & Co., Inc., was, and still is, a corporation, organized under and by virtue of the laws of the State of New York.

IV.

That in the month of May, 1920, Messrs. Comyn, Mackall & Co. shipped on board the said schooner "Rosamond", at the port of Port Blakeley, Washington, a cargo of lumber to be by said vessel transported from said port of Port Blakeley,

Washington, to Cape Town, South Africa, and said Comyn, Mackall & Co. then and there sold and transferred said cargo to said Smith, Kirkpatrick & Co., Inc., and said Smith, Kirkpatrick & Co., Inc., then and there sold and transferred said cargo to Small & Morgan, a copartnership doing business at Cape Town, South Africa, who at all the times herein mentioned and subsequent thereto were the owners of said cargo.

V.

That thereafter said vessel sailed from the said port of Port Blakeley, Washington, with said lumber on board, for said port of Cape Town, South Africa, and while on said voyage experienced heavy gales, which caused said vessel to leak and to jettison her deck cargo; that in consequence thereof it [14] became necessary for the safety of said vessel and the remaining cargo, for said vessel to square away for a port of distress, which she then and there did, and arrived at the port of San Francisco on or about the 16th day of May, 1920.

That on the arrival of said vessel at the port of San Francisco it became necessary to discharge the said cargo and place said vessel in dry dock for repairs.

VI.

That under and by virtue of the contract of affreightment under which said cargo was being transported, the freight on said first cargo was prepaid and considered as earned on the completion of the loading thereof.

VII.

That the said vessel thereupon proceeded upon her voyage and arrived at the port of Cape Town, South Africa, on the 10th day of November, 1920, and safely delivered her said cargo.

VIII.

That the said vessel and the said cargo remaining on board thereof, after said jettison and at the time the said vessel changed her course for the port of distress, are liable to contribution in general average ratably for the cost and expense of putting into said port of distress and repairing said vessel, and such other expense incurred until she was again upon her voyage to the port of Cape Town, South Africa.

IX.

That the valuation of said vessel, less the cost of repairs, is the sum of forty-six thousand, six hundred forty-two and 99/100 dollars ($46,642.99).

X.

That the value of said cargo remaining on board after the jettison of the said deck load and at the time of the changing [15] of the course of said vessel for said port of distress, is the sum of sixty-one thousand, six hundred sixty-two dollars ($61,662.).

XI.

That the expense of said deviation and cost of repairs aforesaid, is the sum of eight thousand,

three hundred seventeen and 62/100 dollars ($8,317.62).

XII.

That the amount of contribution in general average which said cargo should pay to said vessel is the sum of four thousand, six hundred ninety-four and 22/100 dollars ($4,694.22).

XIII.

That heretofore and before the commencement of this action, said Smith, Kirkpatrick & Co., Inc., and cross-respondent, in consideration of the delivery of said cargo to said Small & Morgan, agreed to pay to cross-libelant the amount of the contribution in general average, if any, which should become due from said cargo to said vessel.

XIV.

That on the 15th day of March, 1920, and upon the delivery of said cargo, said Small & Morgan agreed in writing with cross-libelant that all losses and expenses which by way of general average on account of said voyage should be made to appear to be due from them, should be stated by Geo. E. Billings Co., and would be paid by them to said Geo. E. Billings Co.; that a copy of said average agreement is hereunto annexed and marked Exhibit "A"; that in accordance with said agreement, said Geo. E. Billings Co. on May 14, 1921, stated said amounts and determined that there was due from said cargo the sum of four thousand, six hundred

ninety-four and 22/100 dollars ($4,694.22); that copies of said statement were thereupon delivered to said Smith, Kirkpatrick & Co., Inc., and cross-respondent [16] and that neither said Smith, Kirkpatrick & Co., Inc., nor said cross-respondent, nor said Small & Morgan, has ever notified said Geo. E. Billings Co., or cross-libelant, of any objection to said statement.

XV.

That all and singular the premises are true, and within the admiralty and maritime jurisdictions of the United States and of this Honorable Court.

Wherefore, cross-libelant prays that this Honorable Court will be pleased to decree to cross-libelant the payment of said general average contribution amounting to the sum of four thousand, six hundred ninety-four and 22/100 dollars ($4,694.22) with interest and costs, and that said cross-libelant may have such other and further relief as in law and justice it may be entitled to receive.

PILLSBURY, MADISON & SUTRO
Proctors for cross-libelant. [17]

State of California,
City and County of San Francisco—ss.

R. H. Holmberg, being first duly sworn, deposes and says: That he is the Secretary of Pacific Freighters Company, a corporation, the cross-libelant in the above entitled cause, and as such Secretary is authorized to make this verification for and

on behalf of said cross-libelant; that he has read the foregoing Cross-libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and that as to those matters be believes it to be true.

R. H. HOLMBERG

Subscribed and sworn to before me this 26th day of August, 1921.

[Seal] FRANK L. OWEN

Notary Public in and for the City and County of San Francisco, State of California. [18]

EXHIBIT "A".

Geo. E. Billings Co., Average Adjusters and Insurance Brokers, 308-312 California Street, San Francisco.

Represented by Mather & Co., Philadelphia, New York, Boston and Seattle.

AVERAGE AGREEMENT

Whereas, the Scho. "Rosamond" whereof J. H. Brown was Master, having on board a cargo consisting principally of Lumber, sailed from Puget Sound on or about the 15th day of March, 1920, bound for Cape Town, and, in the due prosecution of her said voyage, it is alleged that suffered heavy weather and put into San Francisco for the safety of the vessel and cargo.

And whereas, by reason of the occurrences of the voyage, certain losses and expenses have been incurred, and other losses and expenses may hereafter he incurred, which may be a charge, (by way of General Average or otherwise) upon the said Vessel, her earnings as Freight, and her Cargo, or either of them, or upon specific interests;

Now, in consideration of the premises, we, the subscribers (charterers, owners, shippers, or consignees, of the said Vessel, her earnings as Freight, or her Cargo; or agents or attorneys of charterers, owners, shippers, or consignees, of the interest described and set opposite our signatures), do hereby severally and respectively (but not jointly, or one for the other) covenant and agree (for ourselves personally, our principals, and for our and their respective successors, executors, and administrators), to and with The Pacific Freighters Co. and/or Geo. E. Billings Co. (as Trustees for all concerned), that all losses and expenses aforesaid which shall be made to appear to be due either from us, our principals, or from any firm of which we are or have been co-partners, whether as charterers, owners, shippers, consignees, or as subscribers hereof, shall be paid unto the said Geo. E. Billings Co. (as Trustees for all concerned) by us respectively according to the part or share in the said Vessel, her earnings as freight, or her Cargo, which either belongs to us, belongs or is consigned to, or is for the account of, any person or persons for whom we are agents or attorneys, or with whom we are or

have been co-partners, or in which we are or have been in any manner concerned, provided that such losses and expenses shall be stated and apportioned in accordance with the established usages and laws in similar cases, and such payment shall be made upon the completion of the statement of such losses and expenses, and upon due notice being given of the completion thereof.

And we do further bind ourselves to furnish promptly (upon request of said Adjusters) all such information and documents as they may require from us respectively to make said adjustment; and we warrant that the information furnished will be correct.

And should the value of services rendered in whole or in part to cargo be determined either by amicable settlement or by arbitration, we hereby severally agree to pay each our rateable proportion of any sum thus fixed or determined upon; and in the event of an action or suit being brought to recover for or determine the value of such services, we hereby severally agree to give bond therein in the same manner as if the person or persons by whom suit is brought had required such bond direct from us before surrendering the cargo; and we further severally agree to pay and fully satisfy any final decree that may be rendered.

This agreement may be executed in several parts of like tenor, the whole of which shall constitute but one agreement and shall have the same effect as if each of said parts were severally signed by us.

In Witness Whereof, we have to these presents set our hands, in the City of Cape Town, Union of South Africa, this 20th day of November, in the year of our Lord, One thousand Nine Hundred and Twenty.

Signatures—Small & Morgan.

No. of Packages and Description—11307 pcs. Douglas Fir and/or rough Clear Spruce.

Amount of Invoice—$61661.71. Full particulars and original invoices will be sent you later (direct).

Where insured—Saint Paul Fire Marine Insurance Co. of Saint Paul, Minnesota. [19]

[Endorsed]: Admission of service. Filed Sep. 2, 1921. [20]

[Title of District Court and Cause.]

EXCEPTIONS TO ANSWER.

To the Hon. M. T. Dooling, Judge of the Southern Division of the United States District Court for the Northern District of California, Division One:

St. Paul Fire & Marine Insurance Co., libelant herein, respectfully files its Exceptions to the Answer to the Libel on file in the above named cause, and for ground of exception alleges:

I.

Said libelant excepts to the said answer, and particularly unto the further and separate defense therein contained, upon the ground that the matters

set forth in said alleged further and separate defense, do not constitute a defense to the cause of action set forth in the libel.

Wherefore, libelant prays that the said alleged seprate and further defense be stricken from the said answer and for such other and further relief in the premises as may be proper.

NATHAN H. FRANK
IRVING H. FRANK
Proctors for Libelant.

[Endorsed]: Admission of service. Filed May 15, 1922. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE OUT PORTIONS OF ANSWER

To Pacific Freighters Company, a Corporation, Respondent, and to Messrs. Pillsbury, Madison & Sutro, Proctors for said Respondent:

You And Each Of You Will Please Take Notice: That on Saturday, the 27th day of May, 1922, at the hour of 10 o'clock A.M. of said day, or so soon thereafter as counsel can be heard, at the Court Room of the above entitled Court, in the Post Office Building, in the City and County of San Francisco, the libelant above named will move the Court to strike out the following portions of the answer on file herein:

Libelant moves to strike out that part of the answer beginning on page 4, line 1 thereof with the

words "And for a further and separate defense respondent alleges", down to and including line 18, ending with the words "any objection to said statement," on the ground that the said matter is irrelevant and immaterial, and that the same does not constitute a defense to the cause of action set forth in the libel on file [22] herein.

Said libelant further moves to strike out all that part of the said answer marked "Exhibit 'A'," and attached thereto, called "Average Agreement," on the ground that the same is irrelevant and immaterial.

Said motion will be made upon the pleadings and papers on file in the above entitled cause.

Dated: May 15, 1922.

NATHAN H. FRANK
IRVING H. FRANK
Proctors for Libelant.

[Endorsed]: Admission of service. Filed May 15, 1922. [23]

[Title of District Court and Cause.]

EXCEPTIONS TO CROSS-LIBEL OF PACIFIC FREIGHTERS COMPANY.

To the Hon. M. T. Dooling, Judge of the Southern Division of the United States District Court for the Northern District of California, Division One:

St. Paul Fire & Marine Insurance Co., libelant and cross-respondent herein, respectfully files its

Exceptions to the Cross-libel of Pacific Freighters Company, respondent and cross-libelant herein, and for ground of exception alleges:

I.

Said libelant and cross-respondent excepts to the said Cross-libel on file in the cause above named, on the ground that the same does not state facts sufficient to constitute a cause of action against the libelant and cross-respondent herein.

Wherefore, libelant and cross-respondent prays that the said cross-libel be dismissed and for such other and further [24] relief in the premises as may be proper.

NATHAN H. FRANK
IRVING H. FRANK
Proctors for Libelant and
Cross-respondent.

[Endorsed]: Admission of service. Filed May 15, 1922. [25]

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE OUT PORTIONS OF CROSS-LIBEL.

To Pacific Freighters Company, a Corporation, Cross-Libelant, and to Messrs. Pillsbury, Madison & Sutro, Proctors for said Cross-Libelant:

You, And Each Of You, Will Please Take Notice: That on Saturday, the 27th day of May, 1922, at the hour of 10 o'clock A.M. of said day, or so soon

thereafter as counsel can be heard, at the Court Room of the above entitled court, in the Post Office Building, in the City and County of San Francisco, the cross-respondent above named will move the court to strike out the following portions of the cross-libel on file herein:

Libelant and Cross-respondent moves to strike out that part of the cross-libel beginning on page 4, line 19 thereof with the [26] words, "That on the 15th day of March, 1920", down to the end of allegation XIV of said cross-libel ending with the words on page 5 thereof, line 4 "to said statement", on the ground that the said matter is irrelevant and immaterial.

Libelant and cross-respondent moves to strike out all of "Exhibit 'A'," attached to said cross-libel and called "Average Agreement", on the ground that the matter therein contained is irrelevant and immaterial.

Said motion will be made upon the pleadings and papers on file in the above entitled action.

Dated: May 15, 1922.

NATHAN H. FRANK
IRVING H. FRANK
Proctors for Libelant and
Cross-respondent.

[Endorsed]: Admission of service. Filed May 15, 1922. [27]

[Title of District Court and Cause.]

Nathan H. Frank, Esq. and Irving H. Frank, Esq., Proctors for Libelant.

Pillsbury, Madison & Sutro, Proctors for Respondent.

ON EXCEPTIONS TO ANSWER AND CROSS-LIBEL, AND MOTION TO STRIKE OUT PARTS THEREOF.

The exceptions to the answer, and to the cross-libel herein are overruled, and the motions to strike out parts thereof are denied.

October 5th 1923.

M. T. DOOLING
Judge

[Endorsed]: Filed Oct. 5, 1923. [28]

[Title of District Court and Cause.]

ANSWER TO CROSS-LIBEL.

To the Honorable the United States District Court in and for the Northern District of California, Southern Division. Division Three.

THE ANSWER

of St. Paul Fire & Marine Insurance Co., a corporation, to the cross-libel of Pacific Freighters Company, a corporation, in a cause of general average civil and maritime alleges:

I.

Admits the allegations of Articles I, II, and III, of said cross-libel.

II.

Answering unto Article IV. of the said cross-libel the said cross-respondent admits that in the month of May, 1920, [29] Messrs. Comyn, Mackall & Co. shipped on board the Schooner "Rosamond", at the port of Port Blakeley, Washington, a cargo of lumber to be by said vessel transported from said port of Port Blakeley, Washington, to Cape Town, South Africa, and that said Comyn, Mackall & Co then and there sold and transferred said cargo to Smith, Kirkpatrick & Co., Inc. Cross-Respondent however, denies the allegation in said Article IV. contained, that Smith, Kirkpatrick & Co., Inc., then and there sold or transferred the said cargo to Small & Morgan, and denies that the said Small & Morgan were at all or at any of the times in the said cross-libel mentioned or subsequent thereto, the owners of the said cargo.

III.

Answering unto Article V. of the said Cross-libel, Cross-Respondent admits that the Schooner "Rosamond" sailed from the port of Port Blakeley, Washington, with the cargo of lumber on board hereinabove referred to, for the port of Cape Town, South Africa, and admits that while on her said voyage she experienced heavy gales, which caused

her to leak and to jettison her deck cargo; admits that in consequence thereof it became necessary for the safety of the said vessel and the remaining cargo, for the said vessel to square away for a port of distress, and that she then and there did square away for a port of distress, and arrived at the port of San Francisco, on the 16th day of May, 1920.

Cross-respondent admits that on the arrival of the said vessel at the port of San Francisco, it became necessary to discharge her said cargo and place the said vessel in dry dock for repairs. Cross Respondent further alleges that upon the said repairs being completed, the vessel's said cargo was re-loaded, and a new cargo taken on board to replace the deck load which had theretofore been jettisoned and lost. [30]

IV.

Answering unto Article VI. of the said Cross-libel, Cross-Respondent admits that in and by virtue of the contract of affreightment under which the said cargo of the Schooner "Rosamond" was being transported, the freight on her first cargo was prepaid and considered as earned on the completion of the loading thereof, and Cross-Respondent alleges that for the new cargo taken on board at the port of San Francisco as alleged in the preceding allegation of this Answer, the said Schooner "Rosamond" received a new and addi-

tional freight amounting to the sum of Twenty-one thousand one hundred and nineteen and no/100 dollars ($21,119.00).

V.

Answering unto Article VII. of the said Cross-libel, Cross- Respondent admits that the said vessel thereupon proceeded upon her voyage and arrived at the port of Cape Town, South Africa, and safely delivered her said cargo.

As to the allegation that said vessel arrived at said Port on the 10th day of November, 1920, this Cross-Respondent is ignorant, so that it can neither admit nor deny the same, wherefore it calls for proof thereof.

VI.

Answering unto Article VIII. of the said Cross-libel, Cross-Respondent admits that the said Schooner "Rosamond" and her said cargo remaining on board after the said jettison and at the time the said vessel changed her course for a port of distress, are liable to contribution in general average rateably for the cost and expense of putting into said port of distress and repairing said vessel and such other expense incurred until she was again upon her voyage to the Port of Cape Town, South Africa; and Cross-Respondent further alleges [31] that the said vessel and her said cargo remaining on board after the said jettison are likewise entitled to be credited pro rata for the

extra freight received by the said vessel at the said port of distress, as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned.

VII.

Cross-Respondent admits the allegations of Articles IX., X and XI. of the said Cross-libel.

VIII.

Answering into Article XII. of said Cross-libel, Cross-Respondent denies that the amount of contribution in general average which the said cargo should pay to the said vessel, is the sum of Four Thousand six hundred and ninety-four and 22/100 dollars ($4,694.22), and denies that there is any sum whatsoever or at all, payable or due the said vessel as contribution in general average from the said cargo or otherwise or at all. In this behalf, Cross-Respondent alleges that the freight received by the said vessel as the result of putting into said port of distress, is the sum of Twenty-one thousand one hundred and nineteen and no/100 dollars ($21,119.00), and further alleges that the said vessel should pay as contribution in general average to the said cargo, the sum of Seven Thousand two hundred and twenty-four and 72/100 dollars ($7,224.72).

IX.

Answering unto Article XIII. of said Cross-libel, Cross-Respondent denies that before the com-

mencement of this action, or at any other time or at all, either Smith, Kirkpatrick & Co., Inc., or Cross-Respondent, agreed to pay Cross-libelant, the amount of the contribution in general average if any which should become due from said cargo to said vessel either in consideration of the delivery of the said cargo to Small & Morgan, or in consideration of the delivery of said cargo to anyone or at all, or at all agreed to pay Cross-libelant any contribution in general average. [32]

X.

Answering unto Article XIV. of the said Cross-libel, Cross-Respondent alleges that it has no information as to the allegation therein contained that on the 15th day of March, 1920, or upon the delivery of the said cargo, Small & Morgan agreed either in writing or otherwise with Cross-libelant that all losses and expenses which by way of general average on account of the voyage of the said Schooner "Rosamond" should be made to appear to be due from them, should be stated by Geo. E. Billings Co., and would be paid by them to said Geo. E. Billings Co., wherefore, it can neither admit nor deny the same, and calls for strict proof thereof.

As to the allegation that "Exhibit A" attached to the said Cross-libel is a copy of the said alleged average agreement in said Article XIV. referred to, Cross-Respondent is ignorant so that it can

neither admit nor deny the same, wherefore, it demands strict proof thereof.

Cross-Respondent admits that Geo. E. Billings Co. on or about the 14th day of May, 1921, prepared a statement of general average, but alleges that said statement is imperfect and fails to properly state the items chargeable against the said cargo or against the said vessel and owners, and fails properly to state the items of expense of the contributory values of ship and freight. Further alleges that the said statement fails to show the contribution in general average which the said vessel should pay to said cargo which contribution is estimated by cross respondent to be the sum of Seven thousand two hundred and twenty-four and 72/100 dollars ($7,224.72). As to the allegation that said statement prepared by Geo. E. Billings Co. was so prepared in accordance with the alleged agreement alleged in Article XIV. of the Cross-libel set forth, said Cross-respondent is ignorant so that it can neither admit nor deny the same, wherefore, it calls for strict proof thereof.

Cross-respondent admits that copies of a statement prepared by Geo. E. Billings Co. was delivered to Smith, Kirkpatrick & Co., Inc., but denies that neither Smith, Kirkpatrick & Co., Inc., nor Cross-Respondent ever notified the said Geo. E. Billings Co. or Cross-libelant of its objection to the said statement, and on the contrary alleges [33] that the said Smith, Kirkpatrick & Co. Inc.,

and the said Cross-Respondent did in fact disagree with and object to the said statement so prepared, as imperfect and improper.

XI.

Answering unto Article XV. of said Cross-libel, Cross-Respondent alleges that all and singular the premises are true.

And for a further and separate defense Cross-Respondent alleges that the said Cross-libel fails to state a cause of action against the Cross-Respondent, and that it appears therefrom that no privity of contract exists between said Cross-libelant and the said Cross-Respondent.

Wherefore, Cross-Respondent prays that the said Cross-libel on file herein, may be dismissed and for its costs herein.

SAINT PAUL FIRE AND MARINE INSURANCE COMPANY,
By M. C. HARRISON
NATHAN H. FRANK
and
IRVING H. FRANK
IRVING H. FRANK
Proctors for Cross-Respondent,
1215 Merchants Exchange Bldg.,
San Francisco, Calif [34]

INTERROGATORIES PROPOUNDED TO CROSS-LIBELANT BY CROSS-RESPONDENT AND TO BE ANSWERED UNDER OATH.

First Interrogatory:

Please to state the items and amounts thereof which Pacific Freighters Co. alleged it expended in order that the Schooner "Rosamond" might proceed upon her voyage and earn the additional freight on the cargo taken on at San Francisco after the deviation? Also attach copies of vouchers for the same.

Second Interrogatory:

Please attach to your answers to these interrogatories a copy of the alleged agreement between Smith, Kirkpatrick & Co. Inc., St. Paul Fire & Marine Insurance Co., a corporation, and Pacific Freighters Company, a corporation, whereby it is alleged the said Smith, Kirkpatrick & Co. Inc., and the said St. Paul Fire & Marine Insurance Co. agreed to pay Pacific Freighters Company in consideration of the delivery of the cargo of the Schooner "Rosamond" to Small & Morgan, the amount of any contribution in general average which should become due from the said cargo to the said vessel, as alleged in Article XIII. of the Cross-libel.

Third Interrogatory:

Please attach to your answers to these interrogatories an itemized statement of the additional cargo and the freight received thereon which said cargo was taken on board at the port of San Francisco after a deviation to said port as a port of distress, together with all vouchers with relation thereto.

SAINT PAUL FIRE AND MARINE INSURANCE COMPANY,

By M. C HARRISON.

NATHAN H. FRANK

and

IRVING H. FRANK

Proctors for Cross-Respondent,

1215 Merchants Exchange Bldg.,

San Francisco, Calif. [35]

State of California,

City and County of San Francisco.—ss.

M. C. Harrison, being first duly sworn, deposes and says: That he is the Agent for Saint Paul Fire and Marine Insurance Company, a Corporation, Cross-Respondent in the above entitled cause, and as such Agent is authorized to make this verification for and on behalf of said Cross-Respondent; that he has read the foregoing Answer to Cross-Libel, and knows the contents thereof; that the same is true of his own knowledge, except as to

the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

M. C. HARRISON

Subscribed and sworn to before me, this 29th day of May, 1924.

[Seal] NEVA A. REMPER
Notary Public

[Endorsed]: Admission of service. Filed May 29, 1924. [36]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES ANNEXED TO THE ANSWER TO CROSS-LIBEL FILED HEREIN.

In answer to the First Interrogatory, respondent and cross-libelant says that the items and amounts thereof which respondent and cross-libelant expended in order that the Schooner "Rosamond" might proceed upon her voyage and earn the additional freight on the cargo taken on at San Francisco, are set forth in the Statement of General Average mentioned in Article 14 of the cross-libel, which said statement is hereunto annexed, marked Exhibit "A", hereby referred [37] to and made a part hereof the same as if herein set forth at length; that there was no deviation whatever on the voyage mentioned in said cross-libel; that copies

of the vouchers for said items are set forth in said statement.

In answer to the Second Interrogatory, respondent and cross-libelant says that said agreement is set forth in certain correspondence between respondent and cross-libelant, said Smith, Kirkpatrick & Co. Inc., and libelant and cross-respondent; that copies of said correspondence are annexed and marked Exhibit "B", hereby referred to and made a part hereof the same as if set forth at length.

In answer to the Third Interrogatory, respondent and cross-libelant says that an itemized statement of the additional cargo and the freight received thereon which said cargo was taken on board at the Port of San Francisco as a port of distress, is hereunto annexed and marked Exhibit "C" hereby referred to and made a part hereof the same as if herein set forth at length; that there was no deviation on said voyage; that copies of all vouchers with relation to said additional cargo and freight are hereunto annexed and marked Exhibit "D", referred to and made a part hereof the same as if herein set forth at length.

PILLSBURY, MADISON & SUTRO
Attorneys for Respondent and Cross-Libelant. [38]

State of California
City and County of San Francisco—ss.

R. H. Holmberg, being first duly sworn, deposes and says: I am the Secretary of the Pacific Freighters Company, a corporation, respondent and Cross-libelant in the above case. I have read the foregoing answers to the interrogatories annexed to the libelant and cross-respondent's answer to the cross-libel herein, and the same are true to the best of my knowledge, information and belief.

R. H. HOLMBERG

Subscribed and sworn to before me this 19th day of June, 1924.

[Seal] FRANK L. OWEN
Notary Public in and for the City and County of San Francisco, State of California.

[Clerk's Note: Exhibit A to the Answers to Interrogatories Annexed to the Answer to Cross-Libel (being the Statement of General Average) is identical with Exhibit D to the Stipulation for Submission of Cause herein. Set forth at page 80 of this printed record.] [39]

EXHIBIT "B"

Smith, Kirkpatrick & Co. Inc.
Maritime Bldg. 10 Bridge St.
New York.

November 12th, 1920.

Messrs. W. L. Comyn & Co. Inc.,
San Francisco, Cal.

Dear Sirs:

Insurance Claim "Rosamond"—Notwithstanding we submitted complete papers covering this claim to the San Francisco Underwriters months ago, we are still without any settlement. M. C. Harrison & Co. through whom our brokers covered the cargo appear to have been raising one question after another which has up to now caused a serious delay in reaching an adjustment. Their latest contention covered by a telegram to our brokers here, of which we enclose copy, will show you a totally new contention which is wholly contrary to the views held by all our adjusters and other Underwriters here. Our brokers replied to that message pointing out that the Charter Party called for prepayment of the freight when shipped on the Coast, and which freight was not subject to return if the vessel did not deliver the cargo at destination as their telegram appeared to imply, but presumably they must have had before them the terms of the Charter Party which plainly stated the freight was payable and had been paid when the shipment was made.

We accordingly wired them that their contention was incorrect as so confirmed by the big adjusters here, Johnson & Higgins and Mr. Desbard, Chairman of the Underwriters Adjustment Committee. In the message our brokers added that you [40] would be able to confirm our statement as to the terms of the Charter Party, although our understanding is that some time ago when the insurance claim was presented you communicated with them as to the terms of the Charter Party. Harrison & Co. wired our brokers yesterday that they had referred to you as we directed but that you were unable to say anything definite until the following day. We thereupon thought it advisable to wire you at length, which we did as per copy of message herewith, and hope you will have been able to satisfy Harrison & Company as to the correct terms of the Charter Party. Whether such information will now persuade Harrison & Co. to authorize payment to us of our claim here by the Adjusters, Johnson & Higgins, into whose hands they placed the adjustment, remains to be seen but we sincerely trust there will be an end to this intolerable delay.

Harrison & Co. seem to overlook the fact that freight was paid on the second deck cargo as well as the original deck cargo and that they also insured and received the premium on the former and no one here can understand their contention that we must recover from the ship the prepaid freight on the first deck load.

We must apologize for imposing on your good will and time in this matter but we are most anxious to get an immediate settlement of this long overdue claim and have to thank you in anticipation for helping us towards this end.

Very truly yours,
SMITH, KIRKPATRICK & CO. INC.
G. W. KIRKPATRICK,
Treasurer. [41]

COPY OF TELEGRAM

November 10 AM 12 31

B223SF 133 NL
MX San Francisco Calif 9
Steel & Mayer
3 Cedar St. New York

Rosamond due to the loss of cargo freight was not earned by the ship stop assurers thereby become entitled to your right against the ship for return of prepaid freight stop if ship carries forward a second deck cargo in order to earn freight on first it is earning the freight under a new contract and with a cargo not insured by policies on the first cargo and by accepting such an adjustment you are taking for your own use the freight money belonging to assurers stop assureds are therefore directly liable to assurers for that freight money and it is a proper offset against claim under the policies stop assurers are willing to pay insured value of

the deck cargo lost less the freight on such cargo upon production of the policies.

M. C. HARRISON & CO. [42]

COPY OF TELEGRAM

November 11, 1920

W. L. Comyn & Co. Inc.,
San Francisco, Cal.

Harrison Co. underwriters continue intolerable delay in settling our insurance claim Rosamond on the extraordinary ground that freight on original deck cargo not having been earned they are entitled to deduct same from our claim leaving us to recover such freight from ship apparently ignoring the fact that charter party specifically stipulated freight payable when lumber was shipped. All adjusters here state Harrisons contention untenable. Please see them immediately confirming terms charter party as we cannot longer tolerate further delay settling claim. Wire our expense if Harrison now agreeable authorize adjustment.

SMITH, KIRKPATRICK & CO. INC. [43]

COPY OF TELEGRAM

November 15 AM 28

D37NY 69

AX New York NY 1130A 15

W L Comyn & Co Inc

San Francisco Calif

Have following cable today from consignees Rosamond captain refuses to discharge cargo unless we give a guarantee contribution to general average of twelve percent billings average adjusters if this is in order can you make arrangements with underwriters hasten reply get owners to instruct captain to release goods message ends we are puzzled over this question being referred to us have you word whether cargo arrived intact and undamaged

SMITH KIRKPATRICK & CO INC [44]

Saint Paul Fire and Marine Insurance Co.

M. C. Harrison & Co.
General Agents Marine Dept.,
28 Maryland Bldg.,
San Francisco, Cal.

Nov. 15, 1920.

Schooner "Rosamond" and owners,
San Francisco,
Cal.

Gentlemen:

We have the following telegram from Messrs. Steel & Mayer of New York, representing Messrs. Smith, Kirkpatrick Co:

"New York, Nov. 15, 1920

Rosamond demanding twelve percent general average contribution before discharging cargo deliver guaranty to Comyn McCaull covering this stop wire immediately when accomplished reply at once when payment of loss will be made.

(Signed) STEEL & MAYER"

In accordance therewith, we herewith hand you guarantee signed by the St. Paul Company covering the cargo shipped from Port Blakeley. Kindly Acknowledge receipt.

Yours very truly,

M. C. HARRISON

MCH/ELN Gen. Agt. [45]

(Copy)

Pacific Freighters Company

November 15th, 1920

M. C. Harrison, Esq.,

c/o M. C. Harrison & Co.,

Gen. Ats., Saint Paul Fire & Marine Ins. Co.,

San Francisco, Cal.

Dear Sir:

Rosamond: With respect to your letter of even date, wherein you quote telegram from New York from representatives of Smoth, Kirkpatrick & Company, with regard to the security account gen-

eral average on the "ROSAMOND"; wish to advise that we have already telegraphed our Master and representatives in accordance with our privilege under the English Law, to the effect that we are entitled to a deposit in this instance, and we, therefore, respectfully request that such be arranged instead of the guarantee which you submit, and which is herewith returned.

Yours very truly,

PACIFIC FREIGHTERS COMPANY
R. J. RINGWOOD

RJR/H
Enc
Cy Roy C Ward. [46]

COPY OF TELEGRAM

San Francisco, Cal., November 15th, 1920.

Smith, Kirkpatrick & Co., Inc.,
10 Bridge Street,
New York City

ROSAMOND In view your difficulties collecting your claim from Underwriters we prefer having nothing to do with your insurers and to take deposit to which we are entitled by English law. If

ship detained by delay of consignee in putting up deposit we must insist upon payment demurrage as per charter.

W. L. COMYN & CO INC

(Chge to Sender)
51 Words Strt
RJR/H
12:30 PM
591 [47]

COPY OF TELEGRAM

San Francisco, Cal., November 15th, 1920.

Smith, Kirkpatrick & Co., Inc.,
No. 10 Bridge Street,
New York City

Understand you placed insurance through Steele and Mayer who in turn placed insurance through M C Harrison here who now disputing your claim STOP You will appreciate from our previous telegram owners cannot see their way clear to accept Harrisons guarantee of payment average charges Steele and Mayer have wired Harrison to give owners guarantee STOP Owners will accept cash deposit from M. C. Harrison or guarantee of payment of average charges from yourselves and release cargo promptly but owners are not willing release

cargo and take chances on Harrisons guarantee STOP Consignee has refused put up necessary deposit which in turn he would have to collect from Underwriters in America and owners will not press this point if Harrison makes necessary cash deposit or you guarantee payment average

W L COMYN & CO INC

charges
(Chge to Sender)
130 Words Nite
WLC/H
629 [48]

COPY OF TELEGRAM

1920 Nov 16 PM 4 44

B297NY 107 1/77
co NewYork NY 631P 16
W L Comyn & Co Inc
San Francisco Calif

Rossamond we find guarantee of the StPauls Insurance Co not Harrisons tendered you stop refusal of responsible underwriters guarantee under such circumstances surely an unheard of and arbitrary proceeding stop it is of high importance to us and consignees to proceed quickly with discharge and we beg you will not allow any personal feelings against Harrisons individually to prejudice

our interest we appeal to you in the spirit which invoked your telegram of June fourth and our response moreover our unfailing respect for mutual interest to accept StPauls tendered guarantee and cable master to deliver cargo kindly wire reply quickly to avoid further invaluable loss time discharging

SMITH KIRKPATRICK & CO INC [49]

San Francisco, Cal., November 16th, 1920

Smith, Kirkpatrick & Co., Inc.,
10 Bridge Street,
New York City

Rosamond Replying your message If you will obtain St. Paul Fire and Marine Insurance Companys guarantee in New York to pay average charges we will gladly accept same and cable master immediately to deliver cargo and waive any question of demurrage owing to consignee not making deposit STOP We anxious to assist not impede We have no personal feeling against Harrison but feel that even if we accept St Pauls guarantee made by him we would have trouble in collecting here whereas if you obtain their guarantee are satified you will have no difficulty in collecting as soon as

we forward you average statement for collection under St Pauls guarantee

W L COMYN & CO INC

(Chge to Sender)
118 Words nite
Wlc/H
5:15 PM
678
CyRCWard [50]

Pacific Freighters Company

November 16, 1920

Messrs. Smith, Kirkpatrick & Co.,
Marine Building,
10 Bridge St.,
New York City.

Dear Sirs:

Loss "Rosamond"

This will acknowledge receipt of your letter of the 12th contents of which we have read with interest, and we are enclosing herewith copy of a letter which we have written to M. C. Harrison & Co.

Whether this will be of any good in getting Harrison to change his tactics, we have serious doubt. There is no question about the validity of the claim in every particular, but that will have very little effect on Messrs. M. C. Harrison & Co.

We beg to confirm telegrams passing relative to average charges. The owners unquestionably have the right to ask the consignees to put up the necessary deposit before discharge of cargo is made, and the Owners' adjusters have requested this course be taken. We however, assume this would inconvenience your good buyers in Cape Town, as if they put it up they would have to come back here and collect under the policies through your goodselves. This is, of course, the right method but we realize it would be inconvenient to them and to yourselves, and therefore we are prepared either to collect the deposit here from the underwriters or take a good and sufficient guarantee for the payment of these charges.

While it is true that M. S Harrison & Co. offer St. Paul Fire & Marine guarantees, they have the happy knack of issuing St. Paul Fire & Marine policies and then not paying them. If we accept the guarantee of the St. Paul Fire & Marine Insurance Co. we would be in exactly the same position as you are on your losses. We have for years refused to accept St. Paul Fire & Marine policies written by Harrison in this city, and if we do not take St. Paul Fire & Marine policies written by Harrison, you can understand that we are not [51] accepting St. Paul Fire & Marine guarantee written by the same gentlemen.

We have at all times been willing to accept the St. Paul Fire & Marine policies issued by the agents in New York, and we are equally willing to accept

the guarantee for the payment of average charges, as we have never had any trouble at all in the collection of our claims from the New York Agents, but practically everyone has the same experience with M. C. Harrison & Co. here, and claims do not seem to be collected.

Therefore we wired you that if you can go ahead and get St. Paul Fire & Marine guarantee through your brokers in New York direct, we would accept same and wire the Master to release the cargo and the owners to waive all claims for demurrage owing to the deposit not being put up in Africa.

We think you will agree with us that we are not in any way endeavoring to impede matters, but endeavoring in every way to assist both your goodselves and the Consignees of the cargo, and taking only steps to insure collection of the average charges which we are certainly entitled to do.

We are sure that you will appreciate, in view of the trouble you have had in the collection of your claim through M. C. Harrison & Co. under the St. Paul Fire & Marine Insurance Co. that our position is not untenable in refusing to take St. Paul Fire & Marine guarantee given by Harrison, and on which M. C. Harrison here would have to pay out his money.

Yous very truly,
PACIFIC FREIGHTERS COMPANY
W. L. COMYNS
Director

WLC/M
756 [52]
enc.

Pacific Freighters Company

November 18, 1920

Messrs. M. C. Harrison & Co.,
San Francisco,
California.

Gentlemen:

"Rosamond" Loss

A copy of your telegram of November 10th addressed to Messrs. Steel & Mayer, also the claim of Smith, Kirkpatrick & Co. has just come into our hands.

Therein you say that if the ship carried forward a second cargo in order to earn the freight on the first, etc.

This is to advise you that the vessel was not obligated to carry on a second cargo without the payment of additional freight, and that, as a matter of fact, it was agreed between the shipper of the new cargo and the ship that an additional freight should be paid, and the said new freight was paid.

We are advising you of this because we think it will make clear to you that Messrs. Smith, Kirkpatrick have suffered a loss of the prepaid freight on that cargo which was jettisoned.

Yours very truly,
PACIFIC FREIGHTERS COMPANY
W. L. COMYNS,
Director

M
754 [53]

SAINT PAUL FIRE AND MARINE INSURANCE COMPANY

M. C. Harrison & Co.,
General Agents—Marine Dept.,
28 Maryland Bldg.,
San Francisco, Cal.

Nov 18, 1920

SCH. "ROSAMOND" and Owners,
San Francisco,
California.

Gentlemen:

General Average

Yours of the 15th refusing the St. Paul Company's Guaranty.

The English Law does not give you the privilege of cash deposit. It merely requires that the cargo owner gives a sufficient security for the payment of the General Average. This we have tendered and you refuse.

To send a deposit to South Africa and then to send it back again is a useless expense and is not customary and of no advantage to you and a distinct disadvantage to us.

We protest against such a demand and such a course. We shall hold you responsible for all pecuniary loss and expense resulting from this extraordinary demand and course.

Yours very truly,
M. C. HARRISON
Gen. Agts.

MCH/ELN [54]

Pacific Freighters Company

November 18, 1920

Messrs. M. C. Harrison & Co.,
28 Maryland Building,
San Francisco, Calif.

Dear Sirs:—

"General Average Rosamond"

We beg to acknowledge receipt of your letter of the 18th, contents of which we have read with interest.

Why should we consider a guarantee by you sufficient security for the payment of these charges when we know you are disputing payment of policies you issued on the cargo and for which the buyers paid you premiums in good faith.

In our opinion if you dispute the payment of these policies you are just as liable to dispute payment of our general average charges, and for this reason we do not care to accept the security you offer. We have now arranged with the agents in New York of the receivers of the cargo to accept their guarantee for the payment of our average charges.

Yours very truly,
PACIFIC FREIGHTERS COMPANY
Director

760 [55]

COPY OF TELEGRAM

San Francisco, Cal. November 18th, 1920.

Smith, Kirkpatrick & Co., Inc.,
10 Bridge Street,
New York City

Awaiting advice that you have secured guarantee from St Paul Fire and Marine Insurance Co in order cable Master Rosamond discharge cargo

W L COMYN & CO INC

(Chge to Sender)
21 Words Strt
WLC/H
9:50 AM
763 [56]

COPY OF TELEGRAM

1920 Nov 18 AM 11 41

F14 NY 50
AX NewYork NY 1 P 18
W L Comyn and Co Inc
SanFrancisco Calif

We hereby guarantee you general average due from cargo on sailer Rosamont sailing from Pacific coast to Capetown March nineteentwenty Please cable captain immediately to deliver cargo and wire us to this effect for your personal information we hold similar guarantee from StPaul signed by president now here

SMITH KIRKPATRICK AND CO INC [57]

COPY OF TELEGRAM

San Francisco, Cal., November 18th, 1920

Smith, Kirkpatrick & Co., Inc.,
10 Bridge Street,
New York City

Thanks your wire Have cabled Captain deliver cargo immediately making no claim demurrage account delay deposit

W L COMYN & CO INC

(Chge to Sender)
16 Words Strt
WLC/H
12:10 PM
770 [58]

COPY

St. Paul Fire & Marine Insurance Co.
S/V "Rosamond"
* * * * * * * *

Messrs. Smith, Kirkpatrick & Co., Inc.,
10 Bridge Street,
New York City.

Dear Sirs:

We understand that we insured a full cargo of lumber on the above vessel through our San Francisco office from Pacific coast ports to Cape Town, South Africa. We further understand that the consignees of the cargo, Messrs. Small & Morgan, have

requested that you take charge of the general average claim with our company and arrange for the necessary security.

We understand that the owners of the vessel are willing to accept your guaranty for the payment of general average due from the cargo and that you are willing to give such a guaranty on being guaranteed, in turn, by this company. Accordingly, in consideration of your entering into an agreement (by telegraph or otherwise) with the owners of the vessel to guarantee the payment to them of any general average due from the cargo on the voyage in question, we hereby agree to protect and indemnify you in respect of such guaranty and to pay any general average which may prove to be due from the cargo. It is understood, of course, that you will not actually settle the general average without consulting us, as we will desire an opportunity to examine the general average statement and satisfy ourselves that it is correct before passing upon it.

Very truly yours,

ST. PAUL FIRE & MARINE INSURANCE CO.,

By (F. K. BIGELOW)

President. [59]

Smith, Kirkpatrick & Co., Inc.

Maritime Building, 10 Bridge Street,
New York

November 20, 1920.

Messrs. W. L. Comyn & Co. Inc.,
San Francisco, Cal.

Dear Sirs:

"Rosamond"—Several telegraphic messages have been exchanged between us relative to General Average on this vessel.

We do not purpose rehearsing the story—the most extraordinary one in our long experience and quite incomprehensible in some respects, in the earlier stages at least.

Our Cape Town friends had never been confronted with a demand for cash deposit in general average account before and having knowledge of the irritating delays the St. Paul Insurance Co. have needlessly been putting us to in respect to settlement of our claim—respecting the loss of the deckload—they were afraid to comply lest it might in some way prejudice us here.

Why you should—with the danger and cost of delay in discharging—have taken so exacting a position, moreover have refused to aid in facilitating matters, because at odds with Harrison & Co., we could not imagine—for after all it is not Harrison, as a principal, but the St. Paul Insurance Co. that was concerned.

However, to get to final point, Mr. Bigelow, the President of the St. Paul Insurance Co. happened to be here—we got to him with all the particulars of the case before us—we secured his guarantee per copy herewith. We wired you ours—begging you would cable your Captain immediately to release the cargo.

Your reply came promptly saying this had been done—moreover you were good enough to say that he had also been instructed to waive demurrage—which we were much relieved to get for we had meantime received a cable to say that the consequences were serious and they proposed holding for damages whoever was at fault. [60]

Probably you know that the "Haviside" had arrived at Cape Town but in our message yesterday we thought well to advise you.

You are no doubt getting your share of the troubles. Exporters have had thrust upon them by the refusal of the Banks to purchase foreign Bills of Exchange.

The ordeal is most trying and unfortunately it is hard to figure when and from what source relief can come. New business has of course fallen flat. As of possible interest, we enclose copies of recent circulars we have sent our clients.

Are there any boats for South Africa now under charter and what do you call the market price for

Merchantable Fir and the probable charter rate for a sailer?

Yours very truly,
SMITH, KIRKPATRICK & CO. INC.,
J. A. W. SMITH [61]

W. L. Comyn & Co. Inc.

29th November 1920

Messrs. Smith, Kirkpatrick & Co.,
No. 10 Bridge Street,
New York City N. Y.

Dear Sirs:

Rosamond—This will acknowledge receipt of your valued favor of the 20th, contents of which we have read with interest and our letter in connection with this matter has crossed yours.

We received cable advices from the Captain that he has delivered the cargo and we now presume that everything is in order.

We have read with much interest your circular letters of October 21st and November 3rd, 4th, 10th and 12th and with you, we fail to see where relief is going to come from. We are all up in the air and the only saving clause to our minds to the whole position is the fact that everyone is in the same box and as far as we can see, is likely to stay there until some concerted effort is made by the politicians and bankers working in unison to straighten financial matters up.

Lumber—There absolutely is no market for the reason that it is impossible to finance. The mills are all closing down one after another and while the nominal price of lumber is $27.50 base "H" list, there are no sales being made to amount to anything. We bought one small cargo for South America last week at $26.50 base, but the mill cutting this cargo is closing down as soon as they have the cargo cut. Of course no mill can produce lumber at any such price, paying present prices for logs, that is $24.00 for Merchantable logs. The cost of cutting is about $9.00, so unless the mill owns their own logs and sacrifices them at way below the market, they cannot afford to keep open at $24.00. [62]

The loggers are also closing down all their camps as they cannot sell logs and get any price at all for them.

So far as freights are concerned, they are becoming noticeable by their absence and there is no saying what rate a vessel could be secured at today, if you had a firm order in hand. We should quote So. Africa today, if we had an enquiry, at not to exceed $27.50 for lumber and $40.00 for freight plus insurance, plus a small profit—say in the neighborhood of $70.00 to $72.50, according to the cost of insurance. This is about as close as we can give the market at this writing.

We will appreciate very much if you will favor us with a copy of any further circular letters you

issue as we very much appreciate being kept posted on conditions existing in New York.

Yours very truly,
W. L. COMYN & CO. INC.
W. L. COMYN,
President.

WLC:D
1300 [63]

W. L. Comyn & Co. Inc.

November 29th, 1920.

Messrs. Smith, Kirkpatrick & Co., Inc.,
No. 10 Bridge Street,
New York City.

Dear Sirs:

Referring to our telegram of the 18th of November and previous correspondence, relative to the cargo by the "Rosamond", now being discharged at Capetown.

This simply to advise you that we are now in receipt of a cable, dated the 27th of November, from Captain Brown stating that cargo has been released in accordance with our cable to him of the 18th of November.

Yours very truly,
W. L. COMYN & CO., INC.
R. J. RINGWOOD
Vice President

RHH/
1302 [64]

W. L. Comyn & Co., Inc.

November 29th, 1920.

Messrs. Smith, Kirkpatrick & Co., Inc.,
No. 10 Bridge Street,
New York City.

Dear Sirs:

S/V "Rosamond":

We have to acknowledge receipt of your letter of the 22nd of November, contents of which are noted. This is the first intimation that we have received relative to refusal of the National Bank of South Africa's guarantee. However, due to the fact that we have very little information, other than that passing between your good selves and this office, we shall await advices from you after receipt of information by you, from your friends at Capetown.

"Russell Haviside": We thank you for the information relative to funds for disbursements for this vessel. We shall be pleased to receive your advice as to the amount handed the Captain.

Yours very truly,
W. L. COMYN & CO., INC.,
R. J. RINGWOOD
Vice President.

RHH/
1308 [65]

EXHIBIT "C"

STATEMENT OF ADDITIONAL CARGO AND FREIGHT RECEIVED THEREON AT SAN FRANCISCO

403,641′	at	$20.00 per M	$8,072.82
Less Managing Commission at 2½%			201.82
			$7,871.00

[66]

EXHIBIT "D"

310 California St.,
San Francisco,

November 11th, 1920

Messrs. W. L. Comyn & Co., Inc.,
San Francisco, Cal.

In Account With
Pacific Freighters Company
Schooner "Rosamond"
DEBIT NOTE

To—Freight on Lumber on a/c Replacement 403,641′ at $52.50 per M	$21,191.15

E & O E

San Francisco, California,
November 11th, 1920. [67]

EXHIBIT "D"

310 California St.,
San Francisco,

May 14th, 1921.

Messrs. W. L. Comyn & Co., Inc.,
San Francisco, Cal.

In Account With
Pacific Freighters Company

CREDIT NOTE
Schooner "Rosamond" Voyage 6

By Difference in Freight on Replacement Cargo loaded at San Francisco, as charged on Nov. 11, 1920:		
403,641′ at $52.50 per M	$21,191.33	
As adjusted:		
403,641′ at $20.00 per M	8,072.82	$13,118.33
By Managing Commission on above Freight: 2½% on $8,072.82		201.82
		$13,320.15

E & O E

San Francisco, May 14, 1921

* * * * * * * *

[Endorsed]: Admission of service. Filed Jun. 20, 1924. [68]

[Title of District Court and Cause.]

STIPULATION FOR SUBMISSION OF CAUSE.

It is hereby stipulated that the above named cause may be submitted to the Court for determination on the following question of law, to-wit:

> Where the respondent's and cross-libelant's vessel loaded an entire cargo of lumber, including a deck load, belonging to libelant's assignor, as per charter party marked "Exhibit A" and bills of lading in the form marked "Exhibit B" attached hereto, and the freight thereon was prepaid and considered as [69] earned upon the loading thereof, and the vessel thereafter proceeded on her voyage with all of said cargo on board and in the course thereof she experienced heavy weather which caused her to leak and to jettison her deck cargo and to put into a port of distress for the safety of the vessel and remaining cargo, where she arrived, discharged the same and made repairs upon the completion of which she reloaded the said remaining cargo and took a new deck cargo to replace the jettisoned deck load and received a new and additional freight therefor, and thereupon proceeded upon her voyage and arrived at her port of destination and there safely delivered her cargo, and the vessel and cargo remaining on board after the aforesaid jettison being liable to contribution

in general average ratably for the cost and expense of putting into the port of distress and the general average repairs to the said vessel, and such other general average expense incurred until she was again upon her voyage to her port of original destination, and where the cargo owner prior to taking delivery of the cargo signed a document a copy of which is hereto attached marked "Exhibit C" and a statement of general average was thereafter made, a copy of which is hereto attached and marked "Exhibit D", and made a part hereof, without prejudice to any right libelant may have to question the correctness of said statement or to any right respondent may have to claim that the same is not subject to question, the intention of the parties hereto being that this cause is submitted on the following question of law: [70]

(Question)

Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned.

It is further stipulated that if the vessel and her owners are liable to the cargo owners for a

contribution in general average then the respondent and cross-libelant is liable to the libelant and cross-respondent for the same.

It is further stipulated that if the cargo is liable for any general average contribution to the vessel and her owners then that the libelant and cross-respondent is liable to the respondent and cross-libelant for the same.

It is further stipulated that if the Court shall answer the above question of law in the affirmative, such interlocutory decree may be entered in favor of the libelant with a reference to the United States Commissioner as the Court may deem proper.

It is further stipulated that should the Court answer the question of law in the negative, such decree may be entered as the Court may deem proper.

It is further stipulated that libelant and cross-respondent shall have fifteen (15) days from the date of such submission within which to file an opening brief, respondent and cross-libelant shall have fifteen (15) days to answer and libelant and cross-respondent fifteen (15) days therafter to reply. [71]

It is further stipulated that either party hereto may except to the findings and report of the United States Commissioner, appeal from the final decision of the Court on the question of law and

the ruling of said court on the exceptions to the findings of the Commissioner.

Dated: January 22d, 1925.

NATHAN H. FRANK & IRVING H. FRANK
IRVING H. FRANK
Proctors for Libelant and Cross-Respondent.

PILLSBURY MADISON & SUTRO
Proctors for Respondent and Cross-Libelant. [72]

Freight to be Net pre
loading, same to cons
cargo lost at any sta

APPROVED:-

81. fee for doing Custom [illegible]
82. discharge (inward ~~or outward~~) ~~at any port~~ paying them the usual commission for doing ship's business, or should vessel be lost.
83. R. While at ~~Puget Sound or British Columbia~~, as above, vessel to be consigned to Charterers' agents ~~(Rothschild & Co.)~~, out-
84. ward, and if in ballast, also inward, free of commission, but paying them usual fee for doing Custom House business (not to ex-
85. ceed $25), and also to clear in the name of Charterers.
86. S. Should vessel not have arrived at her loading port, on or before 12 o'clock, noon, of the 31st March, 1920, Charterers
87. to have the option of cancelling or maintaining this Charter, on arrival of vessel.
88. Lay days ~~not~~ to commence ~~before~~ when vessel is ready ~~Unless at Charterers' option.~~
89. T. .....
90. .....
91. .....
92. U. ~~Two and one-half per cent Brokerage is due to~~ ..... ~~on the execution of this Charter Party.~~
93. V. To the true and faithful performance of each and all of the foregoing agreements, we, the said parties, do hereby bind our-
94. selves, our heirs, executors, administrators and assigns, each to the other in the penal sum of

ESTIMATED AMOUNT OF CHARTER

IN WITNESS WHEREOF we have hereunto signed our names at the time and place above mentioned.

WITNESS J. F. McCLAND.

WITNESS C. M. LUTHY.

Signed

PACIFIC FREIGHTERS COMPANY,
per Cyrus Dyder.

COLYER McCALL & COMPANY,
per J. Claude Daly.

Adopted by Pacific Coast Lumber Association.—Form A.

EXHIBIT A.

74

"EXHIBIT B"

Comyn, Mackall & Co.
San Francisco

.....

.....

Exporters of Lumber
Shipping and Commission
Merchants

Under Deck

Mark

.....Pcs. (Lumber) No.....ft.

On Deck

Mark

.....pcs. lumber No.....ft.

Shipped, in good order and condition by
Comyn, Mackall & Co.

on board the American Schooner called the "Rosamond" whereof J. H. Brown is Master, now lying in at the Port of Port Blakely, Washington and bound for Capetown, South Africa to say:

Under Deck

.....pieces lumber

said to contain ..... feet board measure

On Deck

.....pieces of lumber said to contain .....feet board measure.

being marked and numbered as per margin (all on board to be delivered) and to be delivered in like good order and condition at the aforesaid Port of Capetown, South Africa (the act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collision, stranding and other accidents of navigation excepted, even when occasioned by the negligence default or error in judgment of the pilot, master, mariner, or other servants of the shipowners) unto Order or to their assigns, as per Charter Party dated Dec. 31, 1919.

Totals

.....Pcs. .....ft.

At $..... $.....

Freight Prepaid
J. H. B.

with average as per York-Antwerp Rules, 1890, and other conditions and exceptions as per Charter Party. In Witness Whereof, the Master of said Ship or Vessel hath affirmed to Three (3) Bills of Lading, all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Dated in Port Blakely, Washington this 4th day of March 1920

J. H. B.
Master

[74]

"EXHIBIT C"

Geo. E. Billings Co.
Average Adjusters and Insurance Brokers
308-312 California Street
San Francisco
Represented by
Mather & Co.
Philadelphia, New York
Boston and Seattle

AVERAGE AGREEMENT.

Whereas, the Scho. "Rosamond" whereof J. H. Brown was Master, having on board a cargo consisting principally of Lumber, sailed from Puget Sound on or about the 15th day of March, 1920, bound for Cape Town, and, in the due prosecution of her said voyage, it is alleged that suffered heavy

weather and put into San Francisco for the safety of the vessel and cargo.

And whereas, by reason of the occurrences of the voyage, certain losses and expenses have been incurred, and other losses and expenses may hereafter be incurred, which may be a charge (by way of General Average or otherwise) upon the said Vessel, her earnings as Freight, and her Cargo, or either of them, or upon specific interests;

Now, in consideration of the premises, we, the subscribers (Charterers, owners, shippers, or consignees, of the said Vessel, her earnings as Freight, or her Cargo; or agents or attorneys of Charterers, owners, shippers, or consignees, of the interest described and set opposite our signatures), do hereby severally and respectively (but not jointly, or one for the other) covenant and agree (for ourselves personally, our principals, and for our and their respective successors, executors, and administrators), to and with The Pacific Freighters Co. and/or Geo. E. Billings Co. (as Trustees for all concerned), that all losses and expenses aforesaid which shall be made to appear to be due either from us, our principals, or from any firm of which we are or have been co-partners, whether as charterers, owners, shippers, consignees, or as subscribers hereof, shall be paid unto the said Geo. E. Billings Co. (as Trustees for all concerned) by us respectively according to the part or share in the said Vessel, her earnings as freight, or her Cargo, which either be-

longs to us, belongs or is consigned to, or is for the account of, any person or persons for whom we are agents or attorneys, or with whom we are or have been co-partners, or in which we or have been in any manner concerned, provided that such losses and expenses shall be stated and apportioned in accordance with the established usages and laws in similar cases, and such payment shall be made upon the completion of the statement of such losses and expenses, and upon due notice being given of the completion thereof.

And we do further bind ourselves to furnish promptly (upon request of said Adjusters) all such information and documents as they may require from us respectively to make said adjustment; and we warrant that the information furnished will be correct.

And should the value of services rendered in whole or in part to cargo be determined either by amicable settlement or by arbitration, we hereby severally agree to pay each our rateable proportion of any sum thus fixed or determined upon; and in the event of an action or suit being brought to recover for or determine the value of such services, we hereby severally agree to give bond therein in the same manner as if the person or persons by whom suit is brought had required such bond direct from us before surrendering the cargo; and we further severally agree to pay and fully satisfy any final decree that may be rendered.

This agreement may be executed in several parts of like tenor, the whole of which shall constitute but one agreement and shall have the same effect as if each of said parts were severally signed by us.

In Witness Whereof, we have to these presents set our hands, in the City of Cape Town Union of South Africa this 20th day of November in the year of our Lord, One Thousand Nine Hundred and Twenty.

Signatures—Small & Morgan.

No. of Packages and Description—11307 pcs. Douglas Fir and/or rough Clear.

Amount of Invoice—$61661.71. Full particulars and original invoices will be sent you later (direct).

Where insured—Saint Paul Fire Marine Insurance Co. of Saint Paul Minnesota.

[Endorsed]: Filed Jany. 22, 1925. [75]

EXHIBIT D

STATEMENT
OF
GENERAL AVERAGE
SCHR. "ROSAMOND"
MARCH 1920.

Geo. E. Billings Co.
Average Adjusters,
San Francisco.

Narrative

1920.
March 27th,

While on a voyage from Port Townsend, laden with lumber and bound for Cape Town, South Africa, the Schr. "Rosamond", J. H. Brown, Master, experienced a gale causing the vessel to leak badly, and as the pumps could not control the water, it was necessary to jettison part of the deck load. The gas pump and extra supply of coal was under water, and as there was not a sufficient quantity of fresh water and fuel to keep the donkey boiler running continuously, the Master decided for the safety of all concerned to change his course and seek a port of refuge

April 16th,

Encountered a hurricane doing various damage to ship and stores, and on

May 15th,

Arrived in San Francisco.

May 17th,

A survey was had and the discharge of cargo was commenced.

June 24th,

Repairs had been completed and cargo reloaded. Thereafter waited until a new deckload arrived, and on

July 3rd,

The loading thereof was completed. The 4th being Sunday and the 5th a holiday, on

July 6th,

Shifted to Stream. Detained to replace the crew (who had been discharged as a measure of economy).

July 13th,

Resumed the voyage.

Nov. 8th,

Arrived at Cape Town.

Dec. 10th,

Completed discharge of cargo.

This statement is drawn up in accordance with English Law and usuage modified by the York-Antwerp Rules of 1890, (as provided for by the Charter Party).

The San Francisco Disbursements were examined and approved as apportioned by Surveyor Brown.

Master's Protest

State of California,
City & County of San Francisco—ss.

On this 17th day of May, 1920, before me, Frank L. Owen, a Notary Public, duly commissioned and sworn, personally came J. H. Brown, Master of the American Schooner "Rosamond" of San Francisco, who, being first duly sworn, deposes and says: That the said vessel sailed from Port Townsend on the 15th day of March, 1920, laden with lumber and bound for Cape Town, South Africa, and that on March 27th, 1920, or thereabouts, experienced fresh gale from the North, causing vessel to roll and strain and ship seas on deck, and to leak. Located a bad leak in fore peak and as the pumps could not control it, it was necessary to jettison some of the deckload forward. The gas pump was under water and also the extra supply of coal. As there was not a sufficient quantity of fresh water and fuel to keep the donkey boiler running continuously, it was necessary to put into a port for the safety of vessel and cargo. After some light weather, a hurricane was experienced which did various damage to vessel, stores, etc., and some cargo was burnt for fuel and more jettisoned, and on 15th May, 1920, arrived at San Francisco, and fearing

damage, enters his protest against all losses, damages, etc., reserving the right to extend the same at the time and place convenient.

J. H. BROWN,

Master.

Subscribed and sworn to before me this 17th day of May, 1920.

FRANK L. OWEN,

Notary Public in and for the City & County of San Francisco, State of California.

Master's Affidavit

State of California,
City & County of San Francisco—ss.

J. H. Brown, Esq., being first duly sworn, deposes and says:

That he is the Master of the American Schooner "Rosamond" of San Francisco, and was acting in that capacity at all times hereinafter referred to;

That on March 27th, 1920, during a voyage from Port Townsend, laden with lumber, and bound for Capetown, the said vessel experienced very heavy weather, which caused her to strain and spring a bad leak so that it was deemed necessary to change the course and seek a port of refuge for the safety of the ship and cargo;

That after the gasoline pump went out of commission, steam was got up on the donkey boiler to work the pumps and it later became necessary to use salt water to continue the pumping;

That on April 16th, 1920, encountered a hurricane, shipping seas on deck, flooding the cabin and threatening to swamp the vessel, about ten feet of water in the hold. After great difficulty, managed to cut several holes in the deck of the cabin to let the water down into the hold where the pumps could take it;

That on April 18th, 1920, the weather moderated and the deck load was jettisoned from the starboard side to take the list out of the Schooner and ease the leak aft;

That on April 24th, 1920, was forced to jettison some more of the deck load on account of the leak.

That on Saturday, May 15th, 1920, was taken in tow when off Moss Beach (a short distance from San Francisco) by the Tugs "Sea Queen" and "Wyadda" and came to anchor in the stream at 7.20 P.M.

Sunday, May 16th, 1920, machinist worked aboard repairing the boiler and pumps;

Monday, May 17th, 1920, surveyor came aboard and recommended that the cargo be discharged and the vessel go on drydock for repairs and, in pursuance of this recommendation, towed to Oakland City Wharf and commenced discharging cargo men

at work caulking topsides. The crew was discharged as a measure of economy;

That after all the lumber was out, went on drydock to repair the heavy weather damage, and then returned to Oakland City Wharf where the repairs were completed, and the cargo was reloaded;

That on June 24th, 1920, finished reloading the old cargo and waited until June 27th, 1920, when the new deck load arrived by steamer from Port Blakely;

That on July 3rd, 1920, the loading was completed;

That July 6th, 1920, shifted from the Oakland City Wharf to the stream and is now waiting to replace the crew before resuming the voyage;

That all the officers and crew who arrived with him were discharged at San Francisco and have since left this port.

J. H. BROWN.

Subscribed and sworn to before me this 9th day of July, 1920.

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco.

Report of Preliminary Survey

San Francisco, May 18, 1920.

Acting at the request of the owners, I, the undersigned, did on May 17th, 1920, attend on board the above named vessel while anchored in bay off Black Point for the purpose of ascertaining the nature and extent of damage sustained by vessel through encountering heavy weather whilst on a voyage from Port Angeles to Cape Town, South Africa, from which port vessel sailed on March 15th, 1920, fully laden with a cargo of lumber, said vessel having been sighted off Moss Beach standing inshore on May 15th, 1920 by the fisherman who reported to San Francisco by telephone that vessel required assistance.

The tug "Wyadda" under orders proceeded to vessel, also tug "Sea Queen", both tugs placing their tow lines on board and towed vessel to San Francisco, arriving at said port at 7.15 P.M. May 15th, 1920.

Upon arrival and examination the following was noted:

Findings:

That vessel showed signs of encountering heavy weather by her condition fore and aft.

About 30,000 ft. of her original deck load was found on deck aft, a considerable number of pieces having been found cut to provide fuel for donkey boiler.

A number of donkey boiler tubes were found leaking and corroded through on account of excessive use of salt water.

Main Deck in Cabin:

Found about 12 holes chopped in same and as stated this was done to free cabin of water and allow it to run into cargo hold.

Outside Topside Caulking:

Found cement at present water line broken, and missing, oakum worked and washed out of seams, for practically full length of vessel. Caulking of bow ports washed and oakum hanging out, also around stern, the same condition.

Recommendations

That donkey boiler tubes be repaired sufficiently to allow steam to be raised so as to heave up anchor.

That vessel be towed over to the Municipal Wharf at Oakland to discharge what is left of deckload, and to commence discharging a part of under deck cargo to allow for further survey of hull.

That caulkers be got in readiness preparatory to effecting repairs.

A further and continued survey will be held on May 19th, 1920 to determine the exact amount of

damage and repairs needed, when a full detailed report will be made covering all recommendations.

(Signed) CECIL BROWN,
Surveyor for the Board of Marine Underwriters of San Francisco.

Report of Final Survey

Dated, July 26th, 1920.

On May 18, 1920, vessel was towed to Clay Street, Wharf, Oakland to discharge her cargo.

On May 19, 1920, commenced discharging.

On May 26, 1920, finished discharging.

Vessel discharged 34,622 feet from off her deck, this amount being all that was left of the 451,594 feet of her original deckload and 591,785 feet from under deck, making a total of 626,407 feet discharged. The lumber under deck was very wet from salt water and about 100,000 feet stowed in bottom of hold was very much discolored. From time of arrival until discharged, a careful watch was maintained and it was noted that vessel made no water whilst laying still carrying 22″ water in her bilges during this period.

During the period of discharging and after completion, frequent surveys were held to determine vessel's condition and it was found that hull was very badly strained throughout, also rigging.

It was thus recommended that vessel be placed on drydock for examination and on June 2, 1920 was hauled out on the Union Iron Works Marine Railway at Alameda, where survey was held of bottom and the following recommendations were then made.

Keel—Found hogged for 20″.

Caulking of Bottom and Topsides: Cement found broken, oakum wet and spewed.

Recommended—That bottom and topside be caulked full length and to be cemented and painted as before.

Caulking of Waterways, Waterway Seams and Stanchions—Found badly strained and soft and pitch broken.

Recommend—The above to be caulked full length of vessel and to be pitched as before. Wash strakes to be basked off to allow for caulking behind stanchions.

Ceiling—Found open as much as 1½″ in places.

Recommended—That ceiling be wedged full length of vessel both sides.

Lodging Knees of Hold beams found pulled from ceiling 2″.

Recommended—That beams be pumped up; knees drawn back to as near as original position as possible, wedged behind and refastened.

Hardwood Caps—To be installed on all center line stanchions whilst beams are pumped up.

Bow Ports—Found more or less soft, especially around caulking ends.

Recommend—That four new bow ports be made, fitted and installed.

Bow Planks in Wake of Ports—Port Side. Ends of two strakes found soft and split.

Recommend—That two strakes be split out and renewed for a length of ten feet size 5″x6″x5″x8″ and to be fastened as original.

Cant Timbers in wake of ports where found soft; rotten wood to be cut away and reinforced with timbers of the same scantling.

Iron Bill Boards—One found missing and the others disturbed.

Recommend—That same be removed to allow for caulking of seams and to be returned and refastened with new one to replace the one missing.

Plank Sheer Strake—Port sides amidships. Found soft around fastening, also started from fastening.

Recommend: That the above strake be split and renewed to original butts and to be fastened as original.

Bulkhead at Break of Poop deck—In this vicinity hull had spread from strain, allowing considerable water to run into hold.

Recommend—That bulkhead be reinforced with 8x8 timbers installed on fore part of the present bulkhead, the cill of which is to be well fastened to beams and the following timbers to be edge bolted with through bolts and to be well caulked after completion. Before bulkhead is started two 1½″ tie

rods to be installed set up with turnbuckles and to extend from side to side with heads of rods set up countersink ½″x4″ iron plates.

Masts—All masts to be rewedged at main deck with new mast coats.

Main Deck in Cabin—When chopped with axe to allow water to run into hold, size 6″x6″ to be split out and renewed to approved butts as directed.

Joiner work in Cabin—Including T&G bulkheads, doors and locks broken by movable furniture, etc., to be repaired and restored to original condition.

Companion Way Leading to Cabin—Broken by sea. To be repaired and restored to original condition.

Wheel Box—Carried overboard by sea. To be replaced by new one.

Screw Steering Gear—To be overhauled and put into good working condition.

Rigging—Chain outer Bob Stay. Found broken. To be repaired with the required number of links forged into same.

Turnbuckles bolts of Rigging—Where work to be renewed. All standing rigging to be overhauled and set up after repairs.

Main Pumps—To be drawn and overhauled.

Donkey Boiler—Tubes damaged on account of using salt water and all found leaking.

Tubes to be cut out and renewed. A complete list of stores damaged by salt water to be furnished by Master.

Painting—All new work to receive two coats of paint to conform to surrounding colors.

Outside Painting—Whilst vessel is on drydock, bottom to receive one coat of copper paint.

All the above outlined repairs have been completed in a satisfactory manner and vessel restored to a seaworthy condition to enable her to continue on her voyage to Cape Town, South Africa.

Vessel reloaded and ready for sea on July 6, 1920.

CECIL BROWN,

Surveyor.

LOADING CERTIFICATE

I hereby certify that the Am. 4 Mast Schr. "Rosamond", 1030 tons gross, whereof Brown is master for the present voyage from this port to Durban, South Africa, is now loaded and ready for sea.

Her cargo consists of—

Lumber in Hold	626,407 ft.
Lumber on Deck	401,231 ft.
Total	1,027,638 ft.

Height of Deckload
10'8" Ford 11'8" Aft
Draft Loaded in—Salt Water
19 feet 0 inches aft
18 " 9 " for'd
Freeboard
3 feet 6 "

This vessel put into San Francisco on May 15/1920 in distress and with loss of deckload. The under deck cargo was discharged; vessel placed on drydock, damage repaired, bottom and topside caulked, also stanchions and waterways, and rigging overhauled. Vessel reloaded, cargo well and properly stowed and deckload well secured. Hatches caulked and cemented and covered with 2 good tarpaulins each hatch.

Vessel now in all respects fit to continue her voyage.

About 400 M feet of lumber shipped at San Francisco to replace cargo lost.

Surveyed at Oakland and S. F. Bay 7th day of July, 1920.

CECIL BROWN,

Surveyor.

LIST OF STORES

(As compiled by Master.)

Stores and Equipment lost or damaged when deckload jettisoned.

1 Cargo Gaff.
3 14° Leading Blocks.
2 Rigging screws damaged.
1 Sliding spar 8x10″—40 ft.
2 pr. side skids.

REPORT OF SURVEY ON DONKEY BOILER

San Francisco, April 19, 1921.

Messrs. Geo. E. Billings Co.,
San Francisco.

Gentlemen:—

In compliance with your request, please be advised that on March 12, 1921 I proceeded to Murray Bros. shop on Folsom St. for a further survey of the donkey boiler ex above schooner and herewith submit the following:

The top head of the boiler was found very badly pitted and wasted away, from wear and tear, also the bottom of the furnace was found patched for almost the entire circumference of the boiler; as the tubes, 73 in number, at the time of the original survey were found in bad condition, being leaking and burnt from the use of salt water, it was recommended that boiler be retubed, but the condition of the top head and bottom of furnace as found did not warrant new tubes, unless new head and furnace were placed in *shall,* the cost of which would almost equal the price of a new boiler, which was ordered and installed by Murray Bros. as per instructions from Owners' Representative.

Trusting this is the information required,

Yours very truly,

(Signed) CECIL BROWN,
Surveyor.

CERTIFICATE OF VALUATION

San Francisco, Cal. November 29, 1920.

Am. 4 Mast Schr. "Rosamond"

Built of Wood year 1900 at Benecia, Cal.

Gross Tons 1030.

Net Tons 985.

Dimensions 201 x 41 x 17.

At the request of Messrs. W. L. Comyn & Co., I the undersigned have this date appraised the value of the above named vessel in a sound condition as of November 10th, 1920 at Cape Town, South Africa.

After due consideration hereby appraise vessel, with her stores, outfit and equipment then on board as of November 10th, 1920, to be Seventy five thousand and no/100ths ($75,000.00) Dollars, United States Currency.

CECIL BROWN,
Surveyor for the Board of Marine Underwriters of San Francisco.

CHARGES
AND
EXPENSES

[Clerk's note: The first 138 pages of items under the above heading, "Charges and Expenses" (being pages 18-155, inclusive, of the Statement of General Average), are omitted from the printed record pursuant to the order of the court dated July 31, 1939.]

	DISBURSEMENTS		General Average 3rds	General Average Net	Vessel & Owners
37,529.30	Forward		1,232.68	6,511.23	29,785.39
	Thirds off general average		1,232.68		
	As customary		410.89		410.89
			821.79	821.79	
125.00	Board of Marine Underwriters				
	July 7, For services of Captain C. Brown, making surveys and final loading certificate	100.00			
	Nov. 29, Valuation survey by Capt. Brown	25.00			
	Note: There was no Hull Insurance	125.00		125.00	
30.00	Board of Marine Underwriters				
	Underwriters committee examining the adjustment and issuing a certificate	30.00		30.00	
79.60	Dakin Publishing Co.				
	Copies of this statement	79.60		79.60	
37,904.30	Forward			7,567.62	30,196.28

	DISBURSEMENTS Y		General Average Net	Vessel & Owners
37,904.30	Forward		7,567.62	30,196.28
750.00	Adjusters Professional Services; Consultations with vessel Owners and Master; going over accounts with the Underwriters' Surveyor; obtaining security; examining documents, obtaining the contributory values and for this adjustment and apportionment	750.00	750.00	
	General Average		$8,317.62	
	Vessel & Owners			$30,196.28
$38,513.90				

CONTRIBUTING INTERESTS

		Contributory Value	General Average
ssel			
Sound Value ag per Certificate	$75,000.00		
Less Cost of Repairs	28,357.01		
	$46,642.99		
Plus Amounts made good	952.57		
	$47,595.56	$ 47,596.00	$3,623.40
eight None at Risk			
The Charter Party privided:			
Freight payable on loading to be considered earned, vessel or goods lost or not lost.			
rgo			
Shipped by Smith, Kirkpatrick & Co.			
11,307 pcs Douglas Fir and/or Rough Clear Spruce		61,662.00	4,694.22
		$109,258.00	$8,317.62

7.612825%

SETTLEMENT

			Balance to Pay	Balance to Receive
ssel Owners				
Receive: Disbursements & Allowances	$37,654.30			
Pay: General Average	$ 3,623.40			
Owners Column	30,196.28	33,819.68		$3,834.62
rgo Owners and/or Underwriters				
Pay: General Average			$4,694.22	
justers				
Receive: Disbursements	$	109.60		
Fee		750.00		859.60
			$4,694.22	$4,694.22

San Francisco, California,
May 14th, 1921.
GEO. E. BILLINGS CO.
By WILFRED PAGE
Director.

At a stated Term of the District Court of the United States of America, for the Northern District of the State of California, Southern Division, held at the Courtroom in the United States Post Office Building, in the City and County of San Francisco, State of California, on the.....day of July, 1928.

Present: The Honorable A. F. St. Sure, District Judge.

[Title of District Court and Cause.]

INTERLOCUTORY DECREE.

The above entitled cause having been submitted to the Court under a stipulation of facts and for determination on the question of law in said stipulation propounded, and providing that if the Court should answer the question of law in said stipulation referred to in the affirmative, such interlocutory decree be entered in favor of the libelant with a reference to the United States Commissioner as the Court may deem proper;

And the said cause having been fully presented to the Court on briefs filed by the Proctors for the respective parties, and due deliberation having been had, the Court finds that the question of law in the

said stipulation propounded should be answered in the affirmative, and that the contributory value in general [76] average of the vessel in the stipulation herein above referred to, is the sum of Forty-seven thousand Five Hundred and ninety-six and no/100 Dollars ($47,596.00), and that the contributory value of the cargo in said stipulation referred to, is the sum of Sixty-one thousand Six Hundred and Sixty-two and no/100 dollars ($61,662.00), and that the total general average expenses amount to the sum of Eight Thousand Three Hundred and Seventeen and 62/100 dollars ($8,317.62).

Now, therefore, it is ordered that a decree in favor of the libelant and cross-respondent and against the respondent and cross-libelant be entered, and that the said cause be, and it is hereby referred to United States Commissioner Arthur G. Fisk to ascertain and report the gross amount of new freight received by respondent and cross-libelant at the port of refuge referred to in the stipulation on which said cause was submitted and to deduct from the amount thereof the total amount of general average expenses incurred as hereinabove set forth, and to prorate the balance of the said new freight then remaining, between the libelant and cross-respondent and the respondent and cross-libelant in proportion as the contributory value of the vessel and cargo each bears to the whole contributory value.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Admission of service. Filed Jul. 19, 1928. [77]

LIBELANT'S EXHIBIT NO. 2

[Margin]

Vessel Sch. Rosamond

Policy No. 2903 - 8 77186 - 77191

Interest Lumber

Insured $117,600.00

Paid $21,191.16

Adjustment Office

Nature of claim—Lost deckload in heavy weather 451000 ft jettisoned April/May 1920

San Francisco, March 26th, 1921.

Received from the St. Paul Fire & Marine Insurance Co. Twenty One Thousand One Hundred Ninety-One 16/100 Dollars in full settlement of loss under policies as per margin; and in consideration of the payment of the above sum, the insured hereby assigns and transfers all rights in and about the subject matter of the insurance described in the margin, with full privilege and authority to sue in the name of the insured at the expense of the insurer.

Received Apr. 11, 1921. Ans'd.....

SMITH, KIRKPATRICK
& CO. INC.
JA. W. SMITH
E. MAYER

Asst. Treasurer

Please sign and return both vouchers.

(Reverse side)
St. Paul's Ex (2)
E.E.W.
St. Paul's Etc Ex No. (2)
Dec. 1, 1937
ERNEST E. WILLIAMS [78]

LIBELANT'S EXHIBIT NO. 3

[Margin]
Vessel—Sch. Rosamond
Policy No. 2903-2908/77186-77191
Interest—Lumber
Insured $117,600.
Paid $24,486.04
Adjustment—Telegraphic
Nature of Claim—Loss of deckload less estimated freight returnable.
Received Jan - 4 1921 Ans'd.....

San Francisco, March 26th, 1920.

Received from the St. Paul Fire & Marine Insurance Co. without pre*d*judice for further claim for amount of freight deducted viz: $21191.16 Twenty Four Thousand Four Hundred Eighty Six

and 04/100ths ——— Dollars in ~~full~~ settlement of loss under policies as per margin; ~~and in consideration of the payment of the above sum, the insured hereby assigns and transfers all rights in and about the subject matter of the insurance described in the margin, with full privilege and authority to sue in the name of the insured at the expense of the insurer.~~

Freight deducted on basis of M. C. Harrison & Cos. Telegram of Dec. 16th, 1920.

SMITH, KIRKPATRICK
& CO., INC.
G. W. KIRKPATRICK,
Treasurer

Please sign and return both vouchers.

(Reverse side)
St. Paul's Ex (3)
E.E.W.
St. Paul's etc Ex No. 3
Dec. 1, 1937
ERNEST E. WILLIAMS [79]

REPORT OF UNITED STATES COMMISSIONER.

To the Honorable Court Above Named:

Pursuant to the Interlocutory Decree of this Court, the undersigned was directed to ascertain the gross amount of new freight received by the respondent and cross-libelant at the port of refuge;

to deduct from said gross amount of new freight the total amount of general average expense (this general average expense has been determined by this Court); to prorate the balance of the said new freight then remaining, between the libelant and cross-respondent and the respondent and cross-libelant in proportion as the contributory value of the vessel (previously found by this Court) and cargo (previously found by this Court) bears to the whole contributory value (previously found by this Court).

By virtue of the above order, the matter was presented to your Commissioner. Evidence both documentary and oral, was introduced on behalf of the interested parties. Briefs were submitted by the respective litigants.

After considering the evidence and the submitted memoranda, [80] your Commissioner has the honor to report as follows:

Facts.

The Pacific Freighters Company, the respondent, owned a schooner named "Rosamond". During May, 1920, Messrs. Comyn, Mackall & Co., under a charter party, shipped a cargo of lumber on the "Rosamond" from Port Blakeley, Washington, for transportation to Cape Town, South Africa. The lumber was sold to Smith Kirkpatrick & Co.

Shortly after sailing the vessel encountered heavy storms, jettisoned her deck cargo, and in distressed condition put in to San Francisco as a port of refuge.

Subsequent to the making of repairs, the vessel, at the port of distress, loaded a new deck cargo to take the place of the cargo that had been jettisoned. On July 13, 1920, the "Rosamond" proceeded on the voyage. She arrived safely at her destination and the cargo was completely discharged on December 10, 1920.

Some time subsequent to the return of the vessel to San Francisco, an adjustment of freight on the replaced cargo was made between the respondent and W. L. Comyn & Co., the successor to Comyn, Mackall & Co.

Findings.

1. Gross amount of New Freight Received by the Respondent at the Port of Refuge.

Your Commissioner is satisfied and finds that the evidence establishes that the gross amount of new freight received at the port of refuge by the respondent is the sum of $21,191.15.

2. General Average Expense (previously found in the Interlocutory Decree).

This Court, in the Interlocutory Decree, found the general average expense to be the sum of $8,-317.62. Accordingly, your [81] Commissioner finds the general average expense to be $8,317.62.

3. Contributory Value of the Vessel (previously found in the Interlocutory Decree).

This Court found, in the Interlocutory Decree, the contributory value of the vessel to be $47,-

596.00. Accordingly, your Commissioner finds the contributory value of the vessel to be the sum of $47,596.00.

4. Pro-rata of the Balance of the New Freight Remaining after Deduction of General Average Expenses between the Libelant and Cross-Respondent and Respondent and Cross-Libelant in Proportion as the Contributory Value of the vessel and Cargo each bears to the Whole Contributory Value:

Contributory value of the cargo.....$61,662.00
Contributory value of the vessel.....$47,596.00

By simple arithmetic, the contributory value of the cargo is fifty-six per cent of the whole contributory value; the contributory value of the vessel is forty-four per cent of the whole contributory value.

Gross amount of new freight, as found above	$21,191.15
Deducting General Average Expense, as found above	8,317.62
Balance of new freight to be pro-rated	$12,873.53

Your Commissioner finds that prorating the balance of new freight of $12,873.53 in the proportions of 56% (cargo contributory value) and 44% (vessel contributory value), the libelant and cross- respond-

ent is entitled to the sum of $7,199.18; and that respondent and cross-libelant is entitled to the sum of $5,674.35. [82]

Recommendation:

Pursuant to the above findings, your Commissioner recommends that the libelant and cross-respondent be awarded the sum of $7,199.18; and that the respondent and cross-libelant be awarded the sum of $5,674.35.

Dated: April 23rd, 1938.

Respectfully submitted,

ERNEST E. WILLIAMS

U. S. Commissioner. [83]

Accompanying this report the undersigned herewith files the following, to-wit:

St. Paul Fire & Marine Insurance Company's Exhibit No. 1 (Depositions, including libelant's and cross-respondent's Exhibits 1 to 6 inclusive)

St. Paul Fire & Marine Insurance Company's Exhibit No. 2 (Receipt).

St. Paul Fire & Marine Insurance Company's Exhibit No. 3 (Receipt).

Pacific Freighters Company's Exhibit No. 1 (Page 467, Journal)

Pacific Freighters Company's Exhibit No. 2 (Pages 241-240A Journal voucher)

Pacific Freighters Company's Exhibit No. 3 (8 pages from ledger)

Pacific Freighters Company's Exhibit No. 4 (Journal entry)

Memorandum of St. Paul Fire & Marine Insurance Company.

Memorandum of Pacific Freighters Company.

Respectfully,

ERNEST E. WILLIAMS
U. S. Commissioner.

[Endorsed]: Filed Apr. 23, 1938. [84]

At a stated term of the District Court of the United States of America, for the Northern District of California, Southern Division, held at the Courtroom in the United States Post Office Building, in the City and County of San Francisco, State of California, on the ..... day of March, One Thousand Nine Hundred and Thirty-nine.

Present: The Honorable A. F. St. Sure, District Judge.

No. 17,274-S

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation,

Libelant,

vs.

PACIFIC FREIGHTERS COMPANY, a corporation,

Respondent.

PACIFIC FREIGHTERS COMPANY,
a corporation,

Cross-Libelant,

vs.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation,

Cross-Respondent.

FINAL DECREE

This cause having been regularly submitted to the Court for determination, and the Court having given due consideration thereto and having entered its interlocutory decree herein in favor of the libelant and cross-respondent and against the respondent and cross-libelant, and having referred said matter to the United States Commissioner to ascertain and report the gross amount of new freight received by the respondent and cross-libelant as in said interlocutory decree referred to, and to deduct from the amount thereof the total amount of General Average expenses incurred (such General Average expenses having been determined by said interlocutory decree to be the sum of $8,317.62); and to prorate the balance of the said new freight then remaining between the libelant and cross-respondent and the respondent and cross-libelant in proportion as the contributory value of the vessel in said interlocutory decree referred to (such contributory value having been determined by [85]

said interlocutory decree to be the sum of $47,-596.00) and cargo in said interlocutory decree referred to (having been determined by said interlocutory decree to be the sum of $61,662.00) each bears to the whole contributory value. And said Commissioner, having on the 23rd day of April, 1938, duly filed his report herein, wherein and whereby he has found that the gross amount of new freight received by the respondent and cross-libelant is the sum of $21,191.15, and that the balance of the said new freight remaining after the deduction of the General Average expense, as found by the interlocutory decree, is the sum of $12,873.53; that on prorating the said balance of new freight the libelant and cross-respondent is entitled to the sum of $7,199.18, and the respondent and cross-libelant is entitled to the sum of $5,674.35. And the said respondent and cross-libelant having excepted to the said report of the said Commissioner, and the said exceptions having duly come on for hearing on the 6th day of March, 1939, and having been thereupon submitted on briefs by the respective parties, and due deliberation having been had thereon, it is ordered that the said exceptions be and the same hereby are in all things overruled, and the report of the said Commissioner be and the same hereby is in all respects approved and confirmed:

Now, therefore, it is hereby ordered, adjudged and decreed that the respondent and cross-libelant is entitled to retain to itself out of the balance

of new freight collected by it the sum of $5,674.35, and that the libelant and cross-respondent St. Paul Fire & Marine Insurance Co., a corporation, do have and recover from the said respondent and cross-libelant Pacific Freighters Company, a corporation, the sum of $7,199.18, together with interest and costs to be taxed, and that the said libelant and cross-respondent have execution therefor.

And it is further ordered that if this decree be not [86] satisfied within ten days after the entry thereof and notice to the proctors for respondent and cross-libelant, then R. H. Holmberg, surety on the cost bond posted by said respondent and cross-libelant, shall cause the engagements of his stipulations to be performed or show cause within four days why execution should not issue against him, and if no cause be shown within said limit of time, that a summary decree be rendered and entered against said surety and execution issue against him.

March 28, 1939

A. F. ST. SURE
District Judge.

Approved as to form as provided by Rule 22.

.....

Proctors for Respondent and
Cross-Libelant.

Entered in Vol. 31 Judg. and Decrees at Page 321-322.

[Endorsed]: Admission of service. Filed Mar. 28, 1939. [87]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable A. F. St. Sure, Judge of the United States District Court for the Northern District of California:

Pacific Freighters Company, a corporation, respondent and cross-libelant in the above entitled cause, considering itself aggrieved by the final decree made and entered herein on the 28th day of March, 1939, hereby petitions for the allowance of an appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit. Petitioner prays that its appeal be allowed; that the amount of the cost bond to be given by it be fixed; that a citation issue; and that a transcript of record be sent to the appellate court.

Dated: May 29, 1939.

PILLSBURY, MADISON & SUTRO
FELIX T. SMITH
Proctors for Respondent and Cross-Libelant [88]

ORDER ALLOWING APPEAL

The above and hereunto attached petition is hereby granted and the appeal is allowed as prayed. Bond for costs is hereby fixed in the sum of two hundred fifty dollars ($250). It is further ordered

that a citation issue; and that a transcript of record be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: May 29, 1939.

A. F. ST. SURE
United States District Judge

Receipt of a copy of the within Petition for Appeal and Order Allowing Appeal is admitted this 29 day of May, 1939.

IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Libelant and Cross-Respondent

[Endorsed] Filed May 29, 1939. [89]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Pacific Freighters Company, a corporation, respondent and cross-libelant in the above entitled cause, and assigns the following errors in the record and proceedings in the said cause, to wit:

I.

The district court erred in finding and decreeing in its interlocutory decree, dated July 19, 1928, that the question of law propounded in the stipulation for submission of cause herein, to wit,

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned?"

should be answered in the affirmative.

II.

The district court erred in rendering and entering its final decree herein dated March 28, 1939, on the basis of its [90] finding in its interlocutory decree herein dated July 19, 1928, that the question of law propounded in the stipulation for submission of cause, to wit,

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned?"

should be answered in the affirmative.

III.

The district court erred in failing and refusing to hold and decree that respondent and cross-libelant, as owner of the Schooner "Rosamond," is entitled to retain the entire amount of freight re-

ceived by said vessel for the new deck cargo loaded at the port of distress.

IV.

The district court erred in failing and refusing to hold and decree that libelant and cross-respondent is not entitled to any part of the freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress.

V.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" and her owners for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value.

VI.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel [91] and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that respondent and cross-libelant, as owner of

said vessel, is entitled to retain the entire amount of said freight.

VII.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that it is contrary to the charter party (Exhibit "A" to the Stipulation for Submission of Cause herein) and the bills of lading (Exhibit "B" to the Stipulation for Submission of Cause herein) governing the shipment involved herein.

VIII.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that it is contrary to the Statement of General Average (Exhibit "D" to the Stipulation for Submission

of Cause herein) which, by virtue of the Average Agreement (Exhibit "C" to the Stipulation for Submission of Cause herein), was and is binding on both parties hereto.

IX.

The district court erred in decreeing that the gross [92] amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that even if libelant and cross-respondent is entitled to a share of the freight received by said vessel for said cargo, it is entitled to a pro rata share only of the net freight.

X.

The district court erred in rendering and entering the final decree herein dated March 28, 1939.

XI.

The district court erred in rendering the interlocutory decree herein dated July 19, 1928.

XII.

The district court erred in not dismissing the libel herein with costs as prayed in the answer

of respondent and cross-libelant and in not granting to respondent and cross-libelant a decree of dismissal with its costs herein, as prayed.

XIII.

The district court erred in not decreeing to respondent and cross-libelant the payment of the general average contribution of $4,674.22 with interest and costs, as prayed in the cross-libel herein.

Wherefore, respondent and cross-libelant prays that the decree of the district court be reversed, and for such other and further relief as to the court may seem just and proper.

Dated: May 29, 1939.

PILLSBURY, MADISON & SUTRO
FELIX T. SMITH
Proctors for Respondent and Cross-Libelant. [93]

Receipt of a copy of the within Assignment of Errors is admitted this 29 day of May, 1939.

IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Libelant and Cross-Respondent

[Endorsed] Filed May 29 1939. [94]

Pacific Indemnity Company

Los Angeles
Pacific Finance Bldg.

San Francisco
100 Sansome Street

Lee A. Phillips, Chairman of the Board
M. R. Johnson, President

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents:

That we, Pacific Freighters Company, a corporation, respondent and cross-libelant above named, as Principal, and Pacific Indemnity Company, a corporation organized and existing under the laws of the State of California, as Surety, are held and firmly bound unto St. Paul Fire & Marine Insurance Company, a corporation, libelant and cross-respondent above named, in the sum of Two Hundred Fifty and no/100 ($250.00) Dollars, lawful money of the United States of America, to be paid unto said libelant and cross-respondent, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our respective successors, jointly and severally, firmly by these presents.

Signed, sealed and dated this 4th day of May, 1939.

Whereas, the above named respondent and cross-libelant has appealed or is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of the United States District Court for the Northern District of Cali-

fornia, Southern Division, made and entered herein on the 28th day of March, 1939;

Now, therefore, the condition of this obligation is such that if said Pacific Freighters Company, a corporation, shall prosecute said appeal to effect, and pay all costs that may be awarded against it if the appeal is not sustained, then this obligation to be void; otherwise the same to be and remain in full force and effect.

It is further expressly understood and agreed that in case of a breach of any condition of the above obligation, the court in the above entitled cause may, upon notice to the Pacific Indemnity Company of not less than ten days, proceed summarily in the said cause to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

PACIFIC FREIGHTERS COMPANY

[Seal] By R. H. HOLMBERG
Secretary

PACIFIC INDEMNITY COMPANY

[Seal] By R. R. POULTON,
Attorney-in-Fact

State of California,
City and County of San Francisco—ss.

On this 4th day of May in the year one thousand nine hundred and thirty-nine, before me, Emily K. McCorry a Notary Public in and for said County and State, residing therein, duly commissioned and

sworn, personally appeared, R. R. Poulton known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said R. R. Poulton acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] EMILY K. McCORRY
Notary Public in and for the City and County of San Francisco, State of California

My Commission expires December 30, 1942 [95]

State of California,
City and County of San Francisco—ss.

On this 29th day of May, in the year one thousand nine hundred and thirty-nine before me, Mary J. Creech, a notary public in and for said city and county and state, residing therein, duly commissioned and sworn, personally appeared R. H. Holmberg, known to me to be the Secretary of Pacific Freighters Company, the corporation, described in and that executed the within instrument,

and also known to me to be the person who executed it on behalf of the said corporation therein named, and he acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the city and county and state aforesaid the day and year in this certificate first above written.

MARY J. CREECH
Notary Public in and for said City and County of San Francisco, State of California.

My Commission expires May 25, 1941. [96]

Receipt of a copy of the above and hereunto attached bond on appeal is hereby admitted this 29 day of May, 1939, and said bond is approved as to form, amount, and surety.

IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Libelant and Cross-Respondent

The above and hereunto attached bond on appeal is hereby approved.

Dated: May 29, 1939.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed May 29, 1939. [97]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To St. Paul Fire & Marine Insurance Co., a corporation, libelant and cross-respondent in the above entitled cause, and to Irving H. Frank, Esq., and Messrs. Nathan H. Frank & Irving H. Frank, proctors for said libelant and cross-respondent:

You and each of you will please take notice that Pacific Freighters Company, a corporation, respondent and cross-libelant in the above entitled cause, appeals from the final decree made and entered in said cause on the 28th day of March, 1939, to the United States Circuit Court of Appeals for the Ninth Circuit, and that said appeal was allowed by the Honorable A. F. St. Sure, Judge of the above entitled court, on May 29, 1939.

Dated: May 29, 1939.

PILLSBURY, MADISON & SUTRO
FELIX T. SMITH
Proctors for Respondent and Cross-Libelant

Receipt of a copy of the within Notice of Appeal is admitted this 29 day of May, 1939.

IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Libelant and Cross-Respondent

[Endorsed]: Filed May 31, 1939. [98]

[Title of District Court and Cause.]

STIPULATION REGARDING EXHIBITS

It is hereby stipulated by and between the parties hereto that Exhibit "A" to the Answers to Interrogatories Annexed to the Answer to Cross-Libel and Exhibit "D" to the Stipulation for Submission of Cause, instead of being copied in the apostles on appeal herein, may be sent with said apostles to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits.

Dated: June 22, 1939.

PILLSBURY, MADISON & SUTRO
FELIX T. SMITH
Proctors for Appellant
IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Appellee

[Endorsed]: Filed Jun. 24, 1939. [99]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS

Good cause therefor appearing, and the parties to the above entitled cause having so stipulated,

It is ordered that Exhibit "A" to the Answers to Interrogatories Annexed to the Answer to Cross-

Libel, and Exhibit "D" to the stipulation for Submission of Cause, shall, instead of being copied in the apostles on appeal herein, be sent with said apostles to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits.

Dated: June 24, 1939.

A. F. ST. SURE
United States District Judge

Approved as to form.

IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Appellee

[Endorsed]: Filed Jun. 24, 1939. [100]

[Title of District Court and Cause.]

APPELLANT'S PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the above entitled Court:

Please prepare apostles on appeal in the above entitled cause to contain the following:

1. The libel, filed on or about July 13, 1921.
2. The answer, with exhibits annexed thereto, filed on or about September 2, 1921.
3. The cross-libel, with exhibit thereto annexed, filed on or about September 2, 1921.

4. Exceptions of libelant to answer of respondent Pacific Freighters Company, filed on or about May 15, 1922.

5. Notice of motion to strike out portions of answer to libel of Pacific Freighters Company, filed on or about May 15, 1922.

6. Exceptions of libelant to cross-libel of Pacific Freighters Company, filed on or about May 15, 1922.

7. Notice of motion to strike out portions of cross-libel of Pacific Freighters Company, filed on or about May 15, 1922.

8. Order of October 5, 1923, overruling exceptions to answer and cross-libel and denying the motions to strike out parts thereof. [101]

9. The answer to cross-libel, with interrogatories thereto annexed, filed on or about May 29, 1924.

10. The answers to interrogatories annexed to the answer to cross-libel, with exhibits thereto annexed, filed on or about June 20, 1924.

11. The stipulation for submission of cause, with exhibits thereto annexed, filed on or about January 22, 1925.

12. The interlocutory decree, filed on or about July 19, 1928.

13. St. Paul's Exhibits 2 and 3, December 1, 1937, attached to testimony taken before Ernest E. Williams, United States Commissioner.

14. The report of United States Commissioner Ernest E. Williams, filed on or about April 23, 1938.

15. The final decree, filed on or about March 28, 1939.

16. Petition for appeal and order allowing appeal.

17. Assignment of errors.

18. Citation on appeal.

19. Bond on appeal.

20. Notice of appeal.

21. Stipulation regarding exhibits.

22. Order for Transmittal of Original Exhibits.

23. This praecipe and attached stipulation for omissions from apostles on appeal.

Dated: June 22, 1939.

PILLSBURY, MADISON & SUTRO
FELIX T. SMITH
Proctors for Respondent and
Cross-Libelant [102]

STIPULATION FOR OMISSIONS FROM APOSTLES ON APPEAL

It is hereby stipulated by and between the parties hereto that all testimony and documents in the above entitled cause, other than those designated in the foregoing praecipe, are immaterial to a consideration of the errors assigned on the appeal

herein, and may be omitted from the apostles on appeal.

Dated: June 22, 1939.

PILLSBURY, MADISON & SUTRO
FELIX T. SMITH
Proctors for Appellant
IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Appellee

[Endorsed]: Filed Jun. 24, 1939. [103]

[Title of District Court and Cause.]

ORDER ENLARGING TIME TO FILE APOSTLES ON APPEAL

Good cause therefor appearing, it is hereby ordered that the time for filing the apostles on appeal herein and docketing the cause on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and it hereby is, extended to and including July 28, 1939.

Dated: June 24, 1939.

A. F. ST. SURE
United States District Judge

Approved as to form.
IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Appellee

[Endorsed]: Filed Jun. 26, 1939. [104]

[Title of District Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 104 pages, numbered from 1 to 104, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled St. Paul Fire & Marine Ins. Co. vs. Pacific Freighters Company No. 17274-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $10.65 and that the said amount has been paid to me by the Attorneys for the appellant herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of July A. D. 1939.

[Seal] WALTER B. MALING
Clerk.
J. P. WELSH
Deputy Clerk. [105]

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America,—ss:

The President of the United States of America To St. Paul Fire & Marine Insurance Co., a corporation, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein Pacific Freighters Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable A. F. St. Sure, United States District Judge for the Northern District of California this 29th day of May, A. D. 1939

A. F. ST. SURE

United States District Judge.

Receipt of a copy of the above Citation is admitted this 29 day of May, 1939.

IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Libelant and Cross-Respondent, St. Paul Fire & Marine Insurance Co.

[Endorsed]: Filed May 31, 1939. [106]

[Endorsed]: No. 9244. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Freighters Company, a Corporation, Appellant, vs. St. Paul Fire and Marine Insurance Company, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed, July 27, 1939.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 9244

PACIFIC FREIGHTERS COMPANY, a corporation,

Appellant,

vs.

ST. PAUL FIRE & MARINE INSURANCE CO., a corporation,

Appellee.

CONCISE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

and

DESIGNATION OF THE PARTS OF THE RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Appellant, Pacific Freighters Company, hereby adopts, as the points upon which it intends to rely on the appeal herein, its thirteen assignments of error filed herein.

Appellant designates, as the record necessary for the consideration of the foregoing points, the entire transcript of record as certified to the above entitled court, together with the original exhibits; and, pursuant to the order dated July 27, 1939, appellant designates for printing the entire tran-

script of record as certified to the above entitled court, and the following pages of "Exhibit D" to the Stipulation for Submission of Cause, an original exhibit: the title page, pages 1-17, inclusive, and pages 156-167, inclusive.

Dated: July 27, 1939.

FELIX T. SMITH
FRANCIS R. KIRKHAM
PILLSBURY, MADISON & SUTRO
Proctors for Appellant

Receipt of a copy of the foregoing statement of points and designation of record is hereby admitted this 27th day of July, 1939.

IRVING H. FRANK
NATHAN H. FRANK &
IRVING H. FRANK
Proctors for Appellee

[Endorsed]: Filed July 27, 1939. Paul P. O'Brien.

EXCERPT FROM PROCEEDINGS OF MONDAY, JULY 31, 1939.

Before: Denman, Mathews and Healy, Circuit Judges.

No. 9244

[Title of Cause.]

ORDER WAIVING PRINTING OF PORTION OF EXHIBITS

The motion of appellant for an order waiving printing of a portion of original exhibits in this cause coming on regularly for hearing, and it appearing therefrom that appellee consents to entry of order as requested, and Mr. Francis R. Kirkham, counsel for appellant appearing in support of said motion, and good cause therefor appearing, it is ordered that "Exhibit A" to the Answers to Interrogatories Annexed to the Answer to Cross-Libel, and pages 18-155, inclusive, of "Exhibit D" to the Stipulation for Submission of Cause, need not be printed, and that said exhibits shall constitute a part of the record on the appeal herein; and

It is further ordered that in printing the record herein, the clerk of this court shall substitute for said "Exhibit A" the following statement:

> "[Clerk's note: Exhibit A to the Answers to Interrogatories Annexed to the Answer to Cross-Libel (being the Statement of General Average) is identical with Exhibit D to the Stipulation for Submission of Cause herein.]"

and shall substitute for pages 18-155, inclusive, of "Exhibit D" to the Stipulation for Submission of Cause, the following tsatement:

> "[Clerk's note: The first 138 pages of items under the above heading, "Charges and Expenses" (being pages 18-155, inclusive, of the Statement of General Average), are omitted from the printed record pursuant to the order of the court dated July 31, 1939.]"

/ 2

No. 9244

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHTERS COMPANY (a corporation),
Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Appellee.

BRIEF FOR APPELLANT.

FELIX T. SMITH,

FRANCIS R. KIRKHAM,

Standard Oil Building, San Francisco, California,

Proctors for Appellant.

PILLSBURY, MADISON & SUTRO,

Standard Oil Building, San Francisco, California,

Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 9244

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHTERS COMPANY (a corporation),
Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT AS TO JURISDICTION.

This is a suit in admiralty, brought by appellee, as assignee of the owner of cargo shipped on the Schooner "Rosamond," against appellant, the owner of the vessel, to recover $7,224.72 claimed to be due from the vessel to the cargo as general average (Ap. 2-7). Appellant answered, denying that any amount was due the cargo (Ap. 8-16), and filed a cross-libel to recover $4,694.22 due from the cargo to the vessel as general average (Ap. 16-21). The parties stipulated for the submission of the cause to the court on a question of law (Ap. 70-73). The court made an interlocutory decree in favor of appellee and referred the cause to a commissioner (Ap. 99-100). After the reference, the court entered a final decree in favor of

appellee for $7,119.18 (Ap. 109-111). Appellant filed timely petition for an appeal (Ap. 112); the appeal was allowed (Ap. 112-113) and was duly perfected (Ap. 113-135).

The district court had jurisdiction under section 24(3) of the Judicial Code (U.S.C. 28:41). This court has jurisdiction under section 128(a), First, of the Judicial Code (U.S.C. 28:225).

The pleadings necessary to show the jurisdictions are the libel (Ap. 2-7), the answer to the libel (Ap. 8-16), the cross-libel (Ap. 16-25), and the answer to the cross-libel (Ap. 30-37).

STATEMENT OF THE CASE.

Appellant, the owner of the Schooner "Rosamond,"[1] chartered her to Comyn, Mackall & Co.[2] The charter was in the usual form of a voyage charter and provided for the carriage of a full cargo of lumber from the North Pacific Coast to South Africa, freight to be considered earned, vessel or cargo lost at any stage of the voyage,[3] and general average, if any, to be payable under the York-Antwerp Rules of 1890.[4]

Rule I of the York-Antwerp Rules of 1890 provides:[5]

> "No jettison of deck cargo shall be made good as general average."

---

1. Libel, Art. II, Ap. 3; Answer, Art. I, Ap. 8.
2. Stipulation, Ex. "A," Ap. 74.
3. Stipulation, Ex. "A," marginal note, Ap. 74.
4. Stipulation, Ex. "A," Clause P, Ap. 74.
5. Lowndes, General Average, 6th ed., p. 811.

The charterer shipped the cargo of lumber, including a deck cargo,[6] paid the freight,[7] and took bills of lading[8] which provided for average under the York-Antwerp Rules of 1890, and for the application of the other conditions and exceptions of the charter party.[9] The charterer sold the cargo to Smith, Kirkpatrick & Co.,[10] appellee's assignor.[11]

The "Rosamond" sailed on her voyage, met a storm, jettisoned her deck cargo and put into San Francisco as a port of refuge, where she discharged the underdeck cargo, repaired, reloaded the underdeck cargo, and took on a new deck cargo.[12]

Thereafter she proceeded to South Africa and delivered her entire cargo.[13] Prior to taking delivery, the consignee of the underdeck cargo signed the usual general average agreement, providing that losses and expenses should be paid unto Geo. E. Billings Co., as trustees for all concerned, that such losses and expenses should be stated and apportioned, and that payment should be made upon the completion of the statement.[14]

Appellee assumed responsibility for any general average contribution due from the underdeck cargo.[15]

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6. Libel, Art. IV, Ap. 3; Answer, Art. II, Ap. 9; Stipulation, Ap. 70.
7. Stipulation, Ap. 70.
8. Stipulation, Ex. "B," Ap. 75-76.
9. Ap. 76.
10. Libel, Art. IV, Ap. 3; Answer, Art. II, Ap. 9.
11. Libel, Art. XIV, Ap. 6.
12. Libel, Art. V, Ap. 3-4; Answer, Art. III, Ap. 9.
13. Libel, Art. VII, Ap. 4-5; Answer, Art. V, Ap. 10.
14. Stipulation, Ex. "C," Ap. 71, 77-78.
15. Stipulation, Ap. 72.

Pursuant to the foregoing agreement, Geo. E. Billings Co. made the general average adjustment.[16] This adjustment excluded from the general average computation the new freight received for the replacement deck cargo, and the amounts which were spent in earning it. It found the total general average expense to be $8,317.62,[17] and apportioned this, $3,623.40 to the vessel and $4,694.22 to the underdeck cargo, on the basis of their respective contributory values, $47,596 and $61,662.[18]

Appellee refused to pay the contributory share of the cargo; instead, it filed the libel herein, alleging that the new freight should have been included in the general average computation, and that the underdeck cargo was entitled to participate in the new freight in proportion to its contributory value.[19] Appellant answered, denying that any contribution in general average should be paid by the vessel to the cargo on account of the new freight,[20] and filed a cross-libel to recover the contribution of $4,694.22 owed by the cargo under the general average adjustment.[21]

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16. Stipulation, Ex. "D," Ap. 71, 80-99.
Two copies of the Statement of General Average were transmitted to this court by the court below as original exhibits (Ap. 124-125). Pursuant to the order of this court of July 31, 1939 (Ap. 134), these exhibits are part of the record on the appeal. Portions of the Statement of General Average are printed on pages 80-99 of the Apostles on Appeal.
17. Ap. 97.
18. Ap. 98.
19. Ap. 2-7; Art. VIII, Ap. 5.
20. Ap. 8-16.
21. Ap. 16-25.

The parties stipulated for the submission of the cause to the court on the following question of law:[22]

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

The court filed an interlocutory decree, finding that the question should be answered in the affirmative and referring the cause to a commissioner to ascertain and report the gross amount of the new freight, to deduct therefrom the total amount of general average expense, and to prorate the balance between appellee and appellant in proportion as the contributory value of the vessel and cargo each bears to the whole contributory value.[23]

The commissioner, after a hearing, found the gross amount of new freight to be $21,191.15, and, after deducting the amount of general average expense ($8,317.62), apportioned the balance, $5,674.35 to appellant as the owner of the vessel, and $7,199.18 to appellee as owner of the underdeck cargo. Thereafter, the court overruled appellant's exceptions to the commissioner's report and made and entered its final decree, based upon its interlocutory decree and the report of the commissioner, that appellee recover from appellant $7,199.18.[24]

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22. Ap. 70-73.
23. Ap. 99-100. A report of the interlocutory decree appears in 1929 A.M.C. 107.
24. Ap. 109-111.

This appeal followed.

The district court rendered no opinion, either on interlocutory or final decree.

THE QUESTIONS INVOLVED.

The first question is that submitted to the district court by the stipulation:[25]

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned?"

The affirmative answer to this question by the lower court is the basis both for the interlocutory decree and the final decree. Appellant's criticism of that answer is the foundation for its assignments of error I, II, III, IV, V, VI, VII, X, XI, XII and XIII, directed at those decrees and raising this question.

The second question is a subsidiary one and is based upon the assumption that the first question was decided correctly by the district court:

> "Is the amount to be prorated the gross new freight or the net new freight, that is, the gross new freight after deducting expenses incurred in earning it?"

While the stipulation did not submit this question expressly to the district court, nevertheless, that court, in

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25. Ap. 70-73, 71.

its interlocutory decree, went beyond the stipulation and decided expressly that the gross new freight was to be prorated (Ap. 100). The commissioner complied with this ruling (Ap. 105-107), and the final decree confirmed it (Ap. 110-111). Assignment of error IX is directed at this action and raises the question; see also assignments of error X, XI, XII and XIII.

SPECIFICATION OF ERRORS.

The following assigned errors are to be relied upon: assignments of error I, II, III, IV, V, VI, VII, IX, X, XI, XII and XIII (Ap. 113-118).

SUMMARY OF ARGUMENT.

First. The new freight should not be prorated between the vessel and her cargo in general average.

General average relates to *contribution* in order to make good *loss, damage or expense.*

Star of Hope, 9 Wall. 203, 228.

In the instant case, the district court ordered the *distribution* of moneys *received.* There is no shadow of authority for such a course. It is contrary to the principle of general average.

The new freight was not earned by any general average act. The opportunity to earn it arose from the jettison of the deck cargo which was not to be made good in general average (Rule I, York-Antwerp Rules, 1890). It was earned by the vessel which appellant owned and the crew which appellant paid.

Second. In any event, the only thing to be considered should be the net freight, not the gross freight.

Whenever freight comes into a general average adjustment, what is considered is not the gross freight, but the net freight, that is, the gross freight less subsequent expenses incurred to earn it.

Rule XIV, Rules of Practice of the Association of Average Adjusters of the United States, Lowndes, General Average, 6th ed., p. 853;

The Brigella (1893) Probate Div. 189, 196.

Obviously, the only possible benefit to the venture in the instant case was the amount of freight in excess of the expenses incurred to earn it.

The principle of general average is an equitable doctrine.

Milburn & Co. v. Jamaica Fruit Importing and Trading Company of London, 2 Q.B. (1900) 540, 550;

Barnard, et al. v. Adams, et al. (1850) 10 How. 270, 303.

Apportionment of the gross freight would be highly inequitable.

ARGUMENT.

1. THE NEW FREIGHT SHOULD NOT BE PRORATED BETWEEN THE VESSEL AND HER CARGO IN GENERAL AVERAGE.

ASSIGNMENTS OF ERROR.

I.

The district court erred in finding and decreeing in its interlocutory decree, dated July 19, 1928, that the ques-

tion of law propounded in the stipulation for submission of cause herein, to wit,

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

should be answered in the affirmative.

II.

The district court erred in rendering and entering its final decree herein dated March 28, 1939, on the basis of its finding in its interlocutory decree herein dated July 19, 1928, that the question of law propounded in the stipulation for submission of cause, to wit,

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

should be answered in the affirmative.

III.

The district court erred in failing and refusing to hold and decree that respondent and cross-libelant, as owner of the Schooner "Rosamond," is entitled to retain the entire amount of freight received by said vessel for the new deck cargo loaded at the port of distress.

IV.

The district court erred in failing and refusing to hold and decree that libelant and cross-respondent is not entitled to any part of the freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress.

V.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" and her owners for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value.

VI.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that respondent and cross-libelant, as owner of said vessel, is entitled to retain the entire amount of said freight.

VII.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond"

for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that it is contrary to the charter party (Exhibit "A" to the Stipulation for Submission of Cause herein) and the bills of lading (Exhibit "B" to the Stipulation for Submission of Cause herein) governing the shipment involved herein.

X.

The district court erred in rendering and entering the final decree herein dated March 28, 1939.

XI.

The district court erred in rendering the interlocutory decree herein dated July 19, 1928.

XII.

The district court erred in not dismissing the libel herein with costs as prayed in the answer of respondent and cross-libelant and in not granting to respondent and cross-libelant a decree of dismissal with its costs herein, as prayed.

XIII.

The district court erred in not decreeing to respondent and cross-libelant the payment of the general average contribution of $4,674.22 with interest and costs, as prayed in the cross-libel herein.

This is the first case in which this question has been presented to a court. This may be due not only to the fact that no one has had the temerity in similar instances to advance the theory urged by appellee, but also because of the comparative rarity of the concurrence of the particular circumstances out of which the occasion arose. These were:

The charter party embodied the York-Antwerp Rules of 1890 (Clause P, Ap. 74). The first of these rules provides that no jettison of deck cargo shall be made good as general average. The charter provided for prepayment of the freight "same to [be] considered earned vessel or cargo lost at any stage of the entire transit" (marginal clause, Ap. 74). Deck cargo was jettisoned.

Under the first York-Antwerp Rule the jettison was not to be made good in general average. Under the marginal clause, appellant was entitled to keep the freight on the first deck cargo. The jettison left the deck vacant and open to another cargo.

If the foregoing provisions had not been in the charter party, the situation would have been quite different. Probably the customs of the trade were such that the jettison of the deck cargo would have been made good in general average. Since the old freight would have been at risk, the vessel owner would have had a claim for that in general average, but that claim would have been reduced by the net amount of the new freight.[26] By no possibility, however, could there have been any distribution of

26. Baily, General Average, 2d ed., p. 134;
Lowndes, General Average, 6th ed., pp. 348, 783.

the new freight between the vessel and the cargo such as appellee seeks in this case.

General average relates to *contribution* in order to make good *loss, damage* or *expense.* Such is the language of the definition adopted by the Supreme Court (*Star of Hope,* 9 Wall. 203, 228). Such is the consistent language of the authorities, e. g., Lowndes, General Average, 6th ed., pp. 1, 3, 7, 9, and *passim* throughout the work. "Average" (French, *avarie,* Spanish, Portuguese and Italian, *avaria,* Dutch, *haverij,* German, *havarie*) in its maritime usage is (1) a tax (2) any charge or expense, (3) expense or loss (Oxford Dictionary). General average is simply that loss, damage or expense which must be apportioned among the contributing interests. The literature of the subject is barren of any suggestion that a receipt, gain or profit is to be distributed. That, however, is just what the district court ordered here. The untenable result of the district court's ruling is that the underdeck cargo, instead of making a general average contribution to the port of refuge expenses incurred for the preservation of ship and cargo, receives, as a result of the disaster, a gift or profit of more than $7,000.

We find only two instances in which the facts were such as to give rise to a claim—like that of appellee's in the case at bar—that a *profit* should be distributed. In each instance the claim was rejected and the adjustment made without such distribution.

In *Fletcher v. Alexander* (1868), L. R., 3 C. P. 375, half freight had been absolutely prepaid. The cargo was jettisoned. The shipowner took on a new cargo, receiving full

freight for it. In general average, the adjuster allowed the shipper's claim which included the half freight he had paid, but did not require the distribution in general average of any of the new freight received by the shipowner. While the adjustment was questioned in other respects, no question was presented to the court regarding the treatment of the freight. The net result was that the shipowner was left with his freight paid one and one-half times. Lowndes, General Average, 6th Edition, p. 109, remarks:

> "Here was a case in which the shipowner's gain of freight could not be brought in, in diminution of the merchant's loss."

In *The Pinar del Rio,* certain questions were submitted to J. Parker Kirlin, Esq. They arose out of the following state of facts:[27]

> "This vessel, bound from New York to Havana, recently stranded on the coast of Florida, was floated with assistance of salvors, after discharging part of her cargo, which was taken to Miami. Under surveyors' recommendation temporary repairs were made to the vessel lying at anchor off the Coast of Florida; she then proceeded to New York, convoyed by wrecking steamer, and after discharging remainder of her cargo here she was placed in dry dock and is now undergoing repairs of damages sustained by the stranding which, under contract, are to be completed within 25 days.
>
> The vessel, on account of insufficient depth of water at Miami, cannot go to that port for the cargo left

27. The quotation is from Mr. Kirlin's opinion.

there and another vessel has been engaged to transship it to Havana.

Part of the cargo brought to New York in the vessel is in damaged condition and its sale here will, it is expected, be recommended by surveyors. The sound portion (which is non-perishable) is equal to say one-third in bulk of the whole cargo.

The freight on the entire cargo was prepaid on terms indicated in form of bill of lading enclosed."

The question relevant to our discussion was:

"5. When the ship is repaired she will have room available for shipment of new cargo in lieu of that sold or transshipped. How could the net freight received on the new cargo be dealt with in the average statement?"

In an opinion, dated November 19, 1912, Mr. Kirlin made the following answer to this question so far as it relates to new cargo taken in place of the old cargo jettisoned:

"*a. Cargo jettisoned.* I do not think that freight on new cargo shipped to replace cargo jettisoned should be credited to general average. The bill of lading provided that 'freight prepaid shall not be returned, goods or vessel lost or not lost.' The cargo thrown overboard was lost in the sense of this provision. Prepaid freight on such cargo was, therefore, earned. The ship owed no further obligation in respect of it. If, therefore, the charterer ships other cargo in place of the cargo jettisoned, I think he is entitled to keep the freight that may be earned on such new cargo and give no account of it to general average."

The opinion of the experts who prepared the average adjustment in the case at bar is in accord with the above view.

In the instant case, the new freight was not earned by any general average act. Under the first York-Antwerp Rule of 1890, the jettison of the deck cargo was not to be made good in general average. So far as the general average adjustment was concerned, the situation when the "Rosamond" got to San Francisco was precisely as if she had sailed from the North Pacific Coast with her deck vacant. In such a case, the new freight would not figure in general average.

Lowndes, General Average, 6th ed., p. 348;
Baily, General Average, 2d ed., p. 134.

Appellant owned the "Rosamond" and hired and paid her crew. As owner of the vessel it spent more than $30,000 to refit her to carry the new cargo from San Francisco to Capetown (Ap. 97). The new freight was earned by the use of the "Rosamond" and the services of the crew. It must belong to appellant.

2. IN ANY EVENT, THE ONLY THING TO BE CONSIDERED SHOULD BE THE NET FREIGHT, NOT THE GROSS FREIGHT.

ASSIGNMENTS OF ERROR.

V.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" and her owners for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of

the vessel and the cargo each bears to the whole contributory value.

IX.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that even if libelant and cross-respondent is entitled to a share of the freight received by said vessel for said cargo, it is entitled to a pro rata share only of the net freight.

X.

The district court erred in rendering and entering the final decree herein dated March 28, 1939.

XI.

The district court erred in rendering the interlocutory decree herein dated July 19, 1928.

XII.

The district court erred in not dismissing the libel herein with costs as prayed in the answer of respondent and cross-libelant and in not granting to respondent and cross-libelant a decree of dismissal with its costs herein, as prayed.

XIII.

The district court erred in not decreeing to respondent and cross-libelant the payment of the general average con-

tribution of $4,674.22 with interest and costs, as prayed in the cross-libel herein.

Whenever freight comes into the general average adjustment, what is considered is the net freight, that is, the gross freight less subsequent expenses incurred to earn it. Thus, where freight is at risk and is sacrificed by a jettison, the vessel owner has a claim "for the net freight lost, to be ascertained by deducting from the gross freight sacrificed the expenses in respect of same that would have been incurred, subsequent to the sacrifice, to earn it * * *."

Rule XIV, Rules of Practice of the Association of Average Adjusters of the United States, Lowndes, General Average, 6th ed., p. 853; see also Rule IV, p. 850;

Congdon, General Average, pp. 151-152.

When a new freight is substituted and is allowed as a credit against a claim for freight sacrificed, the amount credited is the net new freight, deducting the expenses.

Baily, General Average, 2d ed., p. 134;

Lowndes, General Average, 6th ed., p. 783 (Appendix Z, Coe's Treatise on the Law and Practice of the United States).

Where freight at risk has not been sacrificed and must contribute to the general average, its contributory value is taken at the net freight, that is, the gross freight less future expenses.

Rule XIV, Rules of Practice of the Association of Average Adjusters of the United States, Lowndes, General Average, 6th ed., p. 853;

Baily, General Average, 2d ed., pp. 156-157;

Congdon, General Average, pp. 157-158;

Arnould, Marine Insurance and Average, 11th ed., Vol. II, pp. 1282-1283;

Rule XVII, York-Antwerp Rules, 1890, Lowndes, General Average, 6th ed., pp. 816-817;

The Brigella (1893) Probate Division, 189, 196;

Rathbone v. Fowler (S.D. N.Y., 1869) 6 Blatchf. 294, 20 Fed. Cas. 316, 317 (affirmed, 12 Wall. 102);

Humphreys v. Union Ins. Co. (D. Mass., 1824) 3 Mason, 429, 12 Fed. Cas. 876, 879.

The allowance of gross freight in the case at bar is not only in conflict with the foregoing principles and authorities, but is also obviously unsound. The only possible benefit to the venture was the amount of freight in excess of the expenses incurred to earn it.

The doctrine of general average is equitable in its nature.

Milburn & Co. v. Jamaica Fruit Importing and Trading Company of London, 2 Q.B. (1900) 540, 550;

Barnard, et al. v. Adams, et al. (1850) 10 How. 270, 303;

Frederick H. Leggett & Co. v. 500 Cases of Tomatoes (2d C.C.A., 1926) 15 F.(2d) 270;

The Lewis H. Goward (S.D. N.Y., 1924) 34 F.(2d) 791, 793;

The Roanoke (7th C.C.A., 1893) 59 Fed. 161, 163.

"* * * courts of admiralty, when carrying into execution maritime contracts and liens * * * deal with them upon equitable principles * * *."

Bags of Linseed, 1 Black 108, 114.

Nothing could be more inequitable than the decision of the court below holding appellant accountable for the whole freight and allowing it nothing for the expense of earning it. The cargo—which contributed nothing to the earning of the freight—receives its share as a clear profit, while the vessel—by which the freight was earned—is left to pay from her share (if sufficient) *all* of the expenses incurred in earning both shares. Such a result is without support in reason or authority.

CONCLUSION.

We respectfully submit that the decree of the district court should be reversed with directions to enter a decree in favor of appellant for $4,694.22 with interest and costs.

Dated, San Francisco,
September 25, 1939.

Respectfully submitted,
FELIX T. SMITH,
FRANCIS R. KIRKHAM,
Proctors for Appellant.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

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No. 9244

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHTERS COMPANY
(a corporation),
Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Appellee.

BRIEF FOR APPELLEE.

IRVING H. FRANK,
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Proctors for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

In presenting a statement of the case for the purposes of this Court, it is first proper to set forth the stipulation upon which the cause was submitted to the lower Court, and the question therein propounded to that Court which received its affirmative answer. The stipulation follows:

STIPULATION FOR SUBMISSION OF CAUSE.[1]

It is hereby stipulated that the above named cause may be submitted to the Court for determination on the following question of law, to-wit:

1. Ap. 70-73.

Where the respondent's and cross-libelant's vessel *loaded an entire cargo of lumber, including a deck load, belonging to libelant's assignor,* as per charter party* marked "Exhibit A"[2] *and bills of lading* in the form marked "Exhibit B"[3] attached hereto, and the *freight thereon was prepaid and considered as earned* upon the loading thereof, and the vessel thereafter proceeded on her voyage with all of said cargo on board and in the course thereof she *experienced heavy weather which caused her to leak and to jettison her deck cargo* and *to put into a port of distress* for the safety of the vessel and remaining cargo, *where she* arrived, discharged the same and *made repairs* upon the completion of which she reloaded the said remaining cargo and *took a new deck cargo to replace the jettisoned deck load* and *received a new and additional freight therefor,* and thereupon proceeded upon her voyage and arrived at her port of destination and there safely delivered her cargo, and the vessel and cargo re-

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*The lumber shipment was made by the charterer, Comyn, Mackall & Co., who then and there sold and transferred the cargo to Smith Kirkpatrick & Co., Inc. (Libel., Art. IV, Ap. p. 3; Answer, Art. II, Ap. pp. 8, 9), Smith Kirkpatrick & Co., being the libelant's assignor referred to in the stipulation.

2. Charter Party, Ap. 74.

The following is one of the provisions of the charter party not recited in terms in the stipulation:

"P. General average, if any, payable as per York-Antwerp Rules of 1890."

[Rule 1 of the York-Antwerp Rules of 1890 provides in part as follows:

"Rule 1. Jettison of Deck Cargo. No jettison of deck cargo shall be made good as general average." (Lowndes' General Average, 6th Edition, p. 811.)]

3. Bill of Lading, Ap. 75, 76, providing: "Average as per York-Antwerp Rules, 1890, and other conditions and exceptions as per charter party."

maining on board after the aforesaid jettison being liable to contribution in general average ratably for the cost and expense of putting into the port of distress and the general average repairs to the said vessel, and such other general average expense incurred until she was again upon her voyage to her port of original destination, and where the cargo owner prior to taking delivery of the cargo signed a document a copy of which is hereto attached marked "Exhibit C"[4] and a statement of general average was thereafter made, a copy of which is hereto attached and marked "Exhibit D"[5], and made a part hereof, without prejudice to any right libelant may have to question the correctness of said statement or to any right respondent may have to claim that the same is not subject to question, the intention of the parties hereto being that this cause is submitted on the following question of law:

(Question)

Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned.

It is further stipulated that if the vessel and her owners are liable to the cargo owners for a contribution in general average then the respond-

4. Average agreement, Ap. 76-79.

5. Statement of General Average, Ap. 80-99.
The Statement of General Average fails to credit the new freight received at the port of distress for the new deck load pro rata to the ship and saved cargo.

ent and cross-libelant is liable to the libelant and cross-respondent for the same.

It is further stipulated that if the cargo is liable for any general average contribution to the vessel and her owners then that the libelant and cross-respondent is liable to the respondent and cross-libelant for the same.

It is further stipulated that *if the Court shall answer the above question of law in the affirmative,* such interlocutory *decree may be entered in favor of the libelant* with a reference to the United States Commissioner as the Court may deem proper.

It is further stipulated that should the Court answer the question of law in the negative, such decree may be entered as the Court may deem proper.

The interlocutory decree[6] resulting from the Court's affirmative answer to the question propounded referred the cause to a Commissioner to ascertain and report the gross amount of new freight received by the respondent and cross-libelant at the port of refuge, to deduct from the amount thereof the total amount of general average expenses as found by the Court in its interlocutory decree, and to prorate the balance of the new freight thereafter remaining between the libelant and cross-respondent and the respondent and cross-libelant, in proportion as the contributory value of the vessel and cargo each bear to the whole contributory value.

6. Ap. 99, 100.

The Commissioner found the gross amount of new freight to be $21,191.15, and after deducting the amount of general average expense as found by the District Court, to-wit, $8317.62, apportioned the balance, $7199.18 to the appellee herein, owner of the underdeck cargo, and $5674.35 to the appellant, the ship owner. Thereafter, upon hearing, the Court overruled exceptions filed by the appellant to the finding of the Commissioner and entered its final decree in favor of the appellee for $7199.18.[7]

The facts as stipulated present a case where the appellant Pacific Freighters Company chartered the whole of their vessel with the right of carrying cargo on deck, for the carriage of an entire cargo of lumber from Port Blakeley, Washington, to Capetown, Africa. On the loading of the cargo the charterer sold the same C. I. F. with full shipping documents attached, which included the charter party, to Smith, Kirkpatrick & Co., the assignor of St. Paul Fire & Marine Insurance Company, the appellee herein. Under the terms of the shipping contract the freight on the lumber was prepaid, considered earned, upon the loading of the vessel, vessel lost or not lost, and general average, if any, was payable as per York-Antwerp Rules of 1890.

The vessel with a full cargo proceeded on her voyage, and during the course thereof encountered heavy weather, necessitating the jettison of the entire deck cargo and the immediate seeking of the port of San Francisco as a port of distress, where she dis-

7. Ap. 109-111.

charged the entire remaining cargo and made repairs. She then reloaded the saved cargo and at the same time loaded a new deck cargo in the space occupied by that cargo which had been jettisoned, receiving a new and additional freight therefor, amounting to the sum of $21,191.15. She then safely completed the remainder of her voyage to her destination.

Upon arrival of the vessel at destination, in order to obtain the delivery of their cargo, appellee's assignor signed an average agreement wherein it was provided that it would pay

> "all losses and expenses which shall be made to appear to be due * * * from us * * * according to the part or share in the said * * * cargo which * * * belongs to us * * * *provided that such losses and expenses shall be stated and apportioned in accordance with the established usages and laws in similar cases * * *.*"

The cargo was thereupon delivered to the owners and a statement of general average thereafter made, in which statement the average adjusters failed to credit the new freight of $21,191.15 received at San Francisco, the port of distress, for the new deck load carried in the space formerly occupied by the cargo which had been jettisoned, pro rata to the ship and saved cargo.

In this situation the lower Court determined the rights of the parties and answered affirmatively the following question of law, to-wit:

> "Is the said vessel and her said remaining cargo entitled to be credited pro rata for such extra freight received by said vessel and her

owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

From this affirmative answer of the Court, the appellant has taken its appeal.

THE QUESTIONS INVOLVED.

The appellant has raised but two questions by its appeal, viz.:

a. Did the lower Court by its affirmative answer thereto correctly decide the following question:

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

b. A question as to the propriety of the order of the Court whereby it directed the gross new freight received at the port of distress to be prorated, and not the net new freight.

SUMMARY OF ARGUMENT.

First: The new freight should be prorated between the vessel and her cargo in general average.

(1) The principle of general average is an equitable doctrine seeking to place persons interested in the common venture, so far as may be, in the same

relative position which they occupied before the peril which caused the general average act was met.

The Strathdon, 94 Fed. 206 (D. C. N. Y., Thomas, J.), affirmed 101 Fed. 603, C. C. A. 2nd;

Lowndes on General Average, 6th Edition, p. 358;

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 415, p. 592.

(2) The shipowner may not by jettison be in any wise a gainer.

Gourlie on General Average, p. 488.

(3) The new freight *was earned by a general average act.* The jettison of the cargo and the putting in to a port of distress was a general average act, and the opportunity to earn the new freight was occasioned thereby.

Barclay v. Stirling, 5 M. & S. 6, 105 Eng. Rep. 954;

Chellew v. Royal Commission of the Sugar Supply, 2 K. B. (1921) 627.

(4) General average does not alone relate to contribution. The District Court correctly directed the distribution of moneys received, which is in consonance with the principles of general average, and is no more than a crediting of such moneys. Such credit may or may not result in distribution of moneys received.

Congdon on General Average, 2nd Edition, p. 64;

An account of the meetings of the Conference of the International Law Association at

Stockholm, 1924, contained in a special article "York-Antwerp Rules 1924", 1924 A. M. C. Vol. 2, p. 13 of such special article.

(5) Benefits as well as losses must be taken at the port of destination. The new freight, a benefit received after the peril was met, must be credited pro rata to the cargo and vessel in the same manner as the losses are charged to them. *The ultimate benefits* to the ship and cargo *at the port of destination* is the measure of the values and must contribute in general average.

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 375, p. 547; Sec. 403, p. 575.

(6) The appellee's assignors, Smith, Kirkpatrick & Co., were entitled to the full space of the vessel as per charter party, their contract of purchase was also a purchase of the documents which included the charter party. They are therefore entitled to the entire freight on the new deck cargo subject to the equitable principles of general average.

The Port Adelaide, 62 Fed. 486 (CCA), 59 Fed. 174 (District Court).

(7) The master must be preserved as an impartial agent, unfettered by conflicting interests, when it devolves upon him to determine which interest is to be sacrificed.

The Mary F. Barrett, 279 Fed. 329.

(8) Appellee is not bound by the adjustment.

Minor v. Commercial Union Assurance Co., 58 Fed. 801.

Second: The District Court was correct in directing the prorating of the gross freight.

The appellant was bound to carry forward the saved cargo to destination.

Carver on Carriage of Goods by Sea, 8th Edition, p. 459.

The expense incurred in complying with that duty related to the saved cargo, and the gross freight received at the port of distress was properly prorated.

ARGUMENT.

THE INEQUITABLE ADJUSTMENT—PRELIMINARY STATEMENT WITH RESPECT THERETO.

Before proceeding with the discussion of the appellee's points, we call attention to the Statement of General Average. (Exhibit "D".) In that statement (transmitted to this Court as original exhibit, pp. 15 and 162), the average adjusters have taken as the contributing interests the value of the vessel at the port of destination, less the cost of the repairs at the port of distress, and the saved cargo at its market value at the port of destination, which included the freight paid at the port of departure. The freight paid at the port of departure was added to the value of the cargo as under the terms of the charter party it was considered earned, vessel or goods lost or not lost, which valuation is not questioned by appellee. The average adjusters, however, failed to credit the new extra freight received at the port of distress pro rata to ship and cargo, which presented the question of

law submitted to the trial Court. The losses set forth in the General Average Statement consist wholly of repairs to the vessel, it being conceded by the appellee that, under the York-Antwerp Rules of 1890 (by the terms of the charter party governing the adjustment), the jettisoned deck load was not entitled to contribution.

The effect of the Statement of General Average may be summarized as follows: By reason of the peril encountered by the vessel, a general average loss, consisting wholly of damage to the vessel, in the amount of Eight Thousand Three Hundred and Seventeen Dollars ($8317.00) was incurred (Adjustment, p. 159, transmitted to this Court as original exhibit), of which amount the owner of the vessel was charged with Three Thousand Six Hundred and Twenty-three and 40/100 Dollars ($3623.40), (Adjustment, p. 166), and the owner of the saved cargo the sum of Four Thousand Six Hundred and Ninety-four and 22/100 Dollars ($4694.22). The other repairs in the sum of Twenty-eight Thousand Three Hundred and Fifty-seven and 01/100 Dollars ($28,357.01) were not general average repairs, and the owner of the vessel received the benefit of the same by having them deducted from the contributory value of the vessel. (Adjustment, p. 162.) The benefits derived by the parties were considered by the adjusters as being the sound value of the vessel at Capetown ($75,000.00), less the cost of repairs, the ship being thus valued at $46,642.99. (Adjustment, p. 162.) The benefit to the saved cargo was considered as the market value at

Capetown, which included the prepaid freight. But *the adjusters failed to consider that the vessel received the benefit of $21,191.15 at San Francisco, the port of distress, for the new deck load shipped in the place of that which had been jettisoned.* If its general average contribution were deducted from this new freight, the vessel by reason of the jettison of the deck load would receive a clear profit of $17,567.75 by reason of the general average act, while on the other hand, the cargo owner not only loses his deck load with its prepaid freight which was jettisoned, but also the average contribution in the sum of $4694.22. That *the law of general average does not countenance such an inequitable adjustment,* is manifest from the authorities.

THE NEW FREIGHT SHOULD BE PRORATED BETWEEN THE VESSEL AND HER CARGO IN GENERAL AVERAGE.

1. THE NEW FREIGHT SHOULD BE CREDITED PRO RATA BETWEEN SHIP AND CARGO IN ORDER TO PLACE THE PARTIES AS NEAR AS MAY BE IN THE SAME RELATIVE POSITION WHICH THEY OCCUPIED BEFORE THE PERIL WAS MET.

The average statement would have been in order had the value of the ship at Capetown, South Africa, less the cost of repairs and the value of the remaining cargo saved by the jettison, plus the prepaid freight, been taken as the value of the contributing interests to the general average expenses and repairs, were it not that the venture earned a new freight at the port of distress. This element of the new freight was, however, not taken account of in the average adjustment, and the appellant was thereby given an ad-

vantage over the appellee, by reason of the general average act, in an amount equal to the new freight. *The interests were therefore not placed as near as might be in the same relative position which they occupied before the peril. To adjust the equities* and comply with the rule of contribution, the new freight must be credited pro rata to cargo and vessel so as to *place the parties on an equal footing* with regard to the general average *loss* and *benefits.*

Exemplary of this basic principle, we quote from the case of

The Strathdon, 94 Fed. 206, at 208,

cited with approval many times by the United States Supreme Court:

> "When in a sea adventure, the master of the ship or some person of equivalent authority, voluntarily and necessarily makes a sacrifice of the ship or cargo, in whole or in part, for the purpose and with the result of saving the residue, or the lives of those on board, from a common impending peril, the ship, cargo and freight earned must contribute proportionally to the part thereof saved towards making good the loss suffered and the expenses necessarily incurred thereby. The contribution is called general, gross, or extraordinary average. The Star of Hope, 9 Wall. 203; 3 Kent. Comm. p. 232; Ord. de la Mar (1683) bk. 3, tit. 7, and arts. 1-3; Birkley v. Presgrave, 1 East, 220, 228; Walthew v. Mavrojani, L.R. 5 Exch. 116, 120. *The broad and equitable nature of the rule primarily contemplates ratable contribution from all interests saved towards all interests sacrificed. * * * The spirit and intention of this law is to*

place the persons interested as far as may be, in the same relative position which they occupied before the peril was met, or 'in order to recoup the loser, and place him once more on a footing with his co-adventurers'. Macl. Shipp. (4th Ed.) p. 688. *This intendment involves necessarily reciprocity of obligation and right, mutuality in taking and receiving payment."*

The text books are almost unanimous in support of the maxims thus above propounded. To quote

Lowndes' General Average, 6th Edition, p. 358:

"The general principle of contribution may be summed up in one sentence: *it must be determined how much better off, in a pecuniary sense, each owner of property exposed to hazard on shipboard would be in the event of a safe arrival than in the event of a total loss; and on this amount which represents the benefit derived by each from the sacrifice which has saved the ship, each must contribute."*

Again, the same author at page 308:

"The ground of contribution to general average is benefit received. 'The whole law depends * * * on the loss of the one and the benefit to the other.' This principle can only be completely carried out by adopting ultimate results as the basis of settlement."

See

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 415, p. 592.

2. THE SHIP OWNER MAY NOT BY JETTISON BE IN ANYWISE A GAINER.

Gourlie, in his work *on General Average,* page 488, has stated:

> "The ship owner may not by the jettison be in any wise a gainer; therefore, if subsequent to the jettison, the vessel returns to the port of departure or puts in to an intermediate port in distress, and the missing goods are duplicated or fresh shipments received; the new freight earned by the carriage of these, cancels the loss that would otherwise arise from the original sacrifice. * * *"

This is the principle, among other equitable principles, upon which the present action was instituted, that "the ship owner may not by the jettison be in any wise a gainer". It is predicated upon an opinion rendered by the late Nathan H. Frank, reading in part:

> "I have before me a copy of the Adjustment of General Average on the above named Schooner, concerning which you desire my opinion as to whether or not said Statement of General Average is proper, in view of the fact that the vessel earned a new freight by reason of having put into a port of refuge, and said freight not being accounted for in said statement.
>
> "In my opinion the adjustment is incorrect.
>
> "Having put into a port of distress, a new deck cargo was substituted for that jettisoned and lost, and a new freight earned by the carriage of the subsequent cargo.
>
> "The ship owner, therefore, instead of having suffered a loss by reason of having put into a port

of distress, was a gainer to the extent of the excess of this new freight over and above the expenses incurred by putting into the port of distress.

"The following is the principle applicable to such cases, as stated by *Gourlie* in his work on General Average:

> " 'The ship owner may not by the jettison be in any wise a gainer; therefore, if subsequent to the jettison, the vessel returns to the port of departure or puts into an intermediate port in distress, and the missing goods are duplicated or fresh shipments received; the new freight earned by the carriage of these, cancels the loss that would otherwise arise from the original sacrifice. * * *
>
> " 'An absolutely prepaid freight does not *eo nomine* contribute, neither is it contributed for; but the cargo, at whose risk it has been placed, receives increased allowance thereby in case of sacrifice.'

"As there has been in fact no loss to the ship owner, but, on the contrary, there has been a gain to the ship owner, it seems to me that the cargo, which would be called upon to contribute to the loss, should, in justice and equity be allowed also to participate in the profits of such a deviation to the port of distress."

We would feel that ordinarily this opinion would not have place in the present brief, were it not for the fact that appellant has seen fit to offer an opinion by the late J. Parker Kirlin, where, in addressing his client, he advises that he did not think freight on new

cargo shipped to replace cargo jettisoned should be credited in general average, where the bill of lading provided that freight prepaid shall not be returned, goods or vessel lost or not lost.

Of course, it is not necessary to say that opinions of counsel are not authority except, perhaps, in so far as those counsel are recognized as men of ability and integrity in their calling. Mutual professional regard existed between Mr. J. Parker Kirlin and Mr. Nathan H. Frank, and they both were recognized as leaders in the field of admiralty practice. If Mr. Kirlin's opinion is to be given consideration, then at best it exhibits nothing more than a difference of opinion between counsel of like standing.

Mr. Kirlin's former associates have extended us the courtesy of furnishing a copy of the opinion referred to, which covers more than the one question presented in appellant's brief. Among those was one with relation to cargo transshipped after putting into a port of distress for repairs, in which Mr. Kirlin observes that the ship owner was in any event, after repairs made to its vessel, under obligation to either reload the cargo and carry it forward or bear the ratable expense of forwarding it. He then said:

> "The net freight on new cargo shipped in the space occupied by the cargo so transshipped must, therefore, in some form or manner, be accounted for in general average so as to offset wholly, or as far as it will go, the general average expenses in connection with the forwarding. The ship owner will be debited in the general average with his proportion of the cost of transshipment, but

> against this charge *he will receive a credit, through the medium of general average, of his ratable proportion of the net freight on the fresh cargo shipped in place of it,* which, presumably, will wipe out the debit."

We quote this because the appellant has stated (Brief, p. 7):

> "the District Court ordered the distribution of money received. There is no shadow of authority for such a course. It is contrary to the principle of general average."

At this point we will make comment on the quotation from *Lowndes on General Average,* 6th Edition, page 109, at page 14 of appellant's brief, which relates to the case of *Fletcher v. Alexander* (1868), L. R., 3 C. P. 375. The quotation reads:

> "Here was a case in which the shipowner's gain of freight could not be brought in, in diminution of the merchant's loss."

This is apparently quoted by appellant as authority for its contention that the new freight received at the port of distress in the instant case, although the voyage was continued, is not to be credited in the general average. Not only, as appears from the statement on page 14 of the brief, was no question presented to the Court in the case of *Fletcher v. Alexander* on the subject, but the observation of Lowndes did not in fact relate to a situation such as exists in the instant case, a situation where the voyage was not terminated but continued to destination. Of course, if the voyage

was terminated, then any new freight received properly belonged to the shipowner, but if it was not terminated but continued to destination it did not, and this is all the comment of Lowndes amounts to, for we find in the opinion of Bovill, C. J., in the case of *Fletcher v. Alexander,* and we have before us the report of the case in *English Reports Annotated* (1868), pages 1 to 1616, at page 1513, the following:

> "The whole law is framed upon the principle of there being a loss to the one and a benefit to the other and the contributions being in strict proportion according to the loss sustained and the benefit derived. In this case the adventure, in consequence of the damage which the vessel and her cargo had sustained, put back to Liverpool. Of course the vessel might have been repaired and the cargo or such of it as remained, have been re-shipped, and the adventure have been continued, and the ship have prosecuted her voyage and completed the adventure. But a large portion of the cargo having been thrown overboard, the greater part of the remainder arrived in a damaged condition, and after it had been unloaded, the whole being in a state not fit to be forwarded, the charterers who had paid a considerable portion of the freight, and whose goods were in this state, did not think it worth their while to forward them, and the ship ceased to be in their employment; *so that the adventure,* so far as this matter is concerned, *must be considered to have terminated,* and the voyage to have been broken up at Liverpool, at the time and under the circumstances stated in the case. * * * The adjustment must take place according to the laws of England; and, as it seems to me, the

question of value must be determined with reference to *the adventure having terminated and the voyage being broken up* at Liverpool."

We therefore feel that the citation of the text of Lowndes on General Average is made under a misapprehension of the facts, and is not authority for the appellant's contention.

3. **THE NEW FREIGHT WAS EARNED BY A GENERAL AVERAGE ACT.**

The general average act:

The vessel "experienced heavy weather which caused her to leak and to jettison her deck cargo and to put in to a port of distress for the safety of the vessel and remaining cargo",[8] the jettison and change of course for a port of refuge occurring at the same time.[9]

Authority should not be necessary to support the assertion that the foregoing is a general average act. We, however, call to notice the statements on the subject found in the text of

Carver on Carriage of Goods by Sea, 8th Edition,

as follows:

With relation to jettison, the text in Section 375, page 547, states:

"The most familiar instances of general average sacrifices are jettisons—the casting overboard of cargo or stores in order to lighten the vessel.

8. Stipulation, Ap. 70-73.
9. Exhibit D, Statement of General Average.

> * * * The goods must be thrown overboard for the sake of all."

With relation to seeking a port of distress, the text at Section 403, page 575, states:

> "Where a deviation is voluntarily made to avoid the danger of going on in a ship which is so damaged that a continuance of the voyage is unsafe both for ship and cargo, the deviation is a general average act. It involves extraordinary additional expenses to the shipowner which are voluntarily incurred under the pressure of a common risk for the common safety. It is not a sufficient objection to say that it is the shipowner's duty to take these precautions and incur these expenses under his contract of carriage."

It is a mistaken position on the part of appellant, therefore, to contend that the new freight was not earned by any general average act. What appellant undoubtedly meant to say, so far as the jettison is concerned, was that while jettison was a general average act, the cargo jettisoned was not entitled to contribution because of the contract between the ship owner and the cargo owner, incorporating the York-Antwerp Rules of 1890, Rule 1 of which provides that no jettison of deck cargo shall be made good as general average.

By reason of the jettison of the deck cargo and simultaneously putting in to a port of distress, the vessel was enabled to obtain a new deck cargo and a new freight. Had the vessel not jettisoned her cargo and put in to a port of distress she would not have

been able to load a new cargo and obtain a new freight.

4. GENERAL AVERAGE DOES NOT ALONE RELATE TO CONTRIBUTION.

The suggestion is made in appellant's argument that general average relates alone to contribution in order to make good loss, damage, or expense (Brief, pp. 7, 13), and that the literature on the subject is barren of any suggestion that a receipt, gain or profit is to be distributed. Appellant is in error as to this. We call attention to the proposal at the Stockholm Conference of 1924 when the York-Antwerp Rules of 1924 were adopted. At that conference the following amendment to Rule XV, "Loss of freight", was proposed:

> "*When the voyage is continued, credit shall also be given for freight earned on goods carried in lieu of goods sacrificed,* less expenses actually incurred in earning such freight, including an allowance for extra detention of the vessel due solely to the engagement and loading of the new cargo."[10]

While the clause was not adopted, the meeting voting finally to eliminate it, it did so in the belief that the suggestion which it covered ought not to be put into a general rule, and that it was better in this respect to leave the adjuster free to act as might be best.

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10. That portion of the proposed clause not in italics is not relative to the contention of the appellant that the net freight should in any event be credited, and not the gross freight, as we shall hereafter indicate.

An account of the meetings of the Conference of the International Law Association at Stockholm, 1924, contained in a special article "York-Antwerp Rules 1924", 1924 A. M. C. Vol. 2, p. 13, of such special article.

So in fact the conference did recognize that general average contemplates not only contribution but credit for freight earned on goods carried in lieu of goods sacrificed.

The principle of crediting freight received on cargo loaded at the port of refuge in lieu of cargo sacrificed also carries with it the necessary consequence that if the freight received at the port of refuge is of such a substantial amount as to exceed the contributions which would otherwise be payable, then there must be a distribution under the equitable principles of general average by way of crediting the same to the vessel and the saved cargo pro rata.

We also call attention to

Congdon on General Average, 2nd Edition, p. 64,

where the author says:

"When a jettison or other sacrifice of cargo is made for the common benefit, new cargo is sometimes loaded in the space formerly occupied by the cargo sacrificed. If the original voyage is resumed and completed the net freight earned on the new cargo should be credited against the allowance for freight on the cargo sacrificed."

5. **THE NEW FREIGHT, A BENEFIT RECEIVED AFTER THE PERIL WAS MET, MUST BE CREDITED PRO RATA TO THE CARGO AND VESSEL IN THE SAME MANNER AS LOSSES ARE CHARGED TO THEM.**

In arriving at the values which should contribute in general average, prepaid freight must be added to the value of the cargo, and upon that value the cargo must contribute. The basis of this principle is that in the event of the loss of the ship and the cargo, the cargo, not the vessel, has lost the freight, as the value of the cargo upon payment of the freight, is increased thereby. The rule was taken by the English authorities from the general principle that general average contributions are to be governed by ascertaining how much better off is each of the contributing interests at the port of destination in the event of the successful arrival of the vessel than they would have been in case of a total loss. In discussing this principle which is designated as the English Rule,

> *Lowndes on General Average,* 6th Edition, p. 377,

remarks:

> "The argument in defence of the English Rule is, shortly, this: general average is a species of ransom from total loss, and the liability for it is to be determined by inquiring, not what party contracted beforehand, or supposed he was contracting, to pay it, but simply, who would have been the loser, and to what amount, had the ship been totally wrecked instead of being saved."

The appellee has no criticism with the application of the English rule by the adjusters in the case at bar in including the prepaid freight as a part of the value

of the cargo at destination *but it insists that the same principle must be applied in estimating the benefit to the ship at the port of destination by also ascertaining the amount that the vessel benefited by being saved from total loss.* If such inquiry is made, it appears that the vessel benefited to the extent of the new extra freight received at the port of distress in addition to her value at the port of destination.

The equity of the cargo owner's right to have the extra new freight received at the port of distress contributed pro rata between it and the ship is still further argued by the fact that in prepaying the freight at the port of loading under the charter party letting the whole ship, the cargo owner virtually stands in the shoes of an insurer to the ship of the full freight of the vessel. As an insurer of the full freight of the vessel the cargo owner would be entitled to have the new extra freight paid at the port of distress, credited to its liability for the full freight, as held in the case of

Barclay v. Stirling, 5 M. & S. 6, 105 Eng. Rep. 954,

where the Court had under consideration an action in assumpsit for money had and received. There the plaintiff had insured the freight on the Steamship "Neptune" from the port of Jamaica to London, the voyage described in the policy being at and from port or ports of loading in Jamaica to her port or ports of discharge in the United Kingdom with leave to call at all, any, and every one of the British and Foreign West India Islands, beginning the adventure from the

loading thereof, and providing that it would be lawful for the ship to discharge, exchange and take on board goods at any ports she may call at without being deemed a deviation. On the 30th of October, 1814, the vessel suffered an average loss whereby part of the cargo consisting of sugar, was lost and thereafter the ship put in to the port of Havana as a port of refuge for repairs, and took on board a new cargo to substitute for that which had been lost. The defendants, owners of the vessel, abandoned the freight to the plaintiff insurance company, who paid the full freight. On the 3rd day of May the ship arrived at London and the defendants received the freight for the substituted cargo for which this action was brought. In holding that the plaintiff insurance company was entitled to the new freight received at the port of distress, Lord Ellenborough states:

> "The ship being driven on the coast of Cuba by accidents of the voyage, this became a part of the voyage. And without considering it as a part of the voyage in the first instance, the liberty given to the assured to touch and take in goods at Cuba, incorporates this part of the adventure by necessary construction, with the voyage * * *. This then being freight, which the policy would have covered, had it remained at the risk of the assured, is not the assured a trustee for the underwriter if he receive it after abandonment? All the cases agree that he is, and that he is accountable for the subsequently received freight: *he cannot have both indemnity and freight also.* Therefore, the plaintiff is entitled in this case, deducting only such charges as belong to the freight,

such as the expenses of loading the cargo, and the wages of the crew during the loading."

In that case Bayley, J., also says:

"* * * I therefore think that the Havana freight was covered by the policy. It would be unjust to hold otherwise. The assured estimates the whole freight at 4200 pounds: *if one-half is washed overboard, and a fresh half substituted, why should he be allowed to earn the freight of half and put it into his pocket?* * * * And this action is not brought to recover back from the assured any part of that money which was paid him by the underwriter, *but to recover that portion of the freight which the assured has received after having been paid the full amount of his freight.* * * *"

See, also:

William R. Coe on General Average in the United States, p. 67;

Lowndes on General Average, 6th Edition, p. 783.

Anticipating that the appellant will contend that the new extra freight was uncertain at the time of the general average sacrifice and for that reason should not contribute pro rata to ship and cargo, we call attention to a like contention rejected in the case of

Williams v. The London Assurance Company, 1 M. & S. 318, 105 Eng. Rep. 119,

quoting the remarks of Lord Ellenborough, C. J., as follows:

"This is the case of an insurance on the outward voyage on a ship chartered for a voyage

out and home; in the course of which outward voyage an average loss has happened; and the question is, whether the freight payable under the charter party is liable to contribute to general average. It is contended that the whole freight out and home is not liable; but the whole was affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss happening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution: and the difficulty as to the outward and homeward voyage seems to be removed by the consideration that the whole freight was saved by the repairs. * * *"

In that case LeBlanc, J., also says:

"The stress of the argument for the plaintiff is this, that the contribution was uncertain at the time of the loss. But in all cases of contribution to general average, freight cannot at the moment of the loss be received, and therefore the contribution must be always uncertain; and yet in Da-Costa v. Newnham (2 T.R. 407), freight was determined to be contributory. *It is therefore not a decisive argument against its being contributory that the thing does not exist in certainty at the time of the loss* * * *".

The question therefore resolves itself into only one of whether the contributing benefits of the different interests are to be taken (1) at the time of the sacrifice, (2) at the port of distress, or (3) at the port of destination upon the successful termination of the voyage. In considering this point we find a stipulation in the charter party and the bills of lading providing: "with average as per York-Antwerp Rules, 1890".

One of the prerequisites to the right to contribution in general average is that there must be a successful termination of the voyage, on the ground that if the ship and her cargo successfully survive a storm by making a general average sacrifice and thereafter encounter another storm which destroys the vessel and her cargo, no interest has gained by the sacrifice and therefore no interest is to contribute. This condition precedent necessarily prescribes the rule that the port of destination must be the place where the *benefits and losses* to the interests must be computed, as held in the case of

Chellew v. Royal Commission of the Sugar Supply, 2 K.B. (1921) 627,

where the Court had under consideration an action by a shipowner for contribution in general average from the cargo owner for repairs made to the vessel at a port of distress. Upon a showing that the vessel and her cargo were lost upon the subsequent voyage from the port of distress to the port of destination, the Court in deciding that there was no right to a general average contribution, as there was no *ultimate benefit* to the cargo or ship at the port of destination, says:

"In my opinion the arguments in favor of taking the state of facts at the termination of the venture are more weighty, especially because: (1) The value of the property when it reaches the hands of its owners can be ascertained with precision. (2) There ought to be only one adjustment of the nature of general average. Endless confusion would result from a multiplicity of adjustments made on a multiplicity of different considerations. (3) *The whole law depends,* as was said in Fletcher v. Alexander, (L.R. 3 C.P. 375, 382), *on the loss to the one and the benefit, that is, in my view,* THE ULTIMATE BENEFIT *to the other.* * * *

* * * * * * *

"I agree with the conclusions stated by the learned arbitrator in para. 18 of the special case, which are as follows:

'(i) The right of a shipowner to contribution in general average is the same, whether his claim is for contribution to a general average sacrifice or for contribution to general average expenditure.

'(ii) *The extent of the right of a shipowner to contribution in general average is the same as the extent of the right to such contribution of any other party to the contract of affreightment.*

'(iii) *A claim to contribution in general average by any party to the contract of affreightment must be assessed upon the properties of all parties to that contract upon the values of such properties at the port of adjustment, and the port of adjustment,* if the voyage has not been abandoned at an earlier port, *is*

the port of the agreed destination under that contract.

'(iv) If the property of any party to the contract of affreightment who is called upon to contribute in general average to another party or parties has no value at the port of adjustment, either by its arrival in a worthless condition or by its not arriving at all, that party cannot be made to contribute.'

"I think (1) on the question of principle the law demands the loss of the one and the *ultimate benefit* of the other, and (2) on the question of practice certainty and convenience instead of confusion are to be obtained by one adjustment at the port of destination."

It follows from the foregoing, that *in the case at bar the ultimate benefits* at the port of destination included *the new* extra *freight received at the port of distress,* and that freight must therefore contribute pro rata to the vessel and the saved cargo.

6. **APPELLEE'S ASSIGNOR'S, SMITH, KIRKPATRICK & CO., WERE ENTITLED TO THE FULL SPACE OF THE VESSEL AS PER CHARTER PARTY. THEIR CONTRACT OF PURCHASE WAS ALSO A PURCHASE OF THE DOCUMENTS WHICH INCLUDED THE CHARTER PARTY. THEY ARE THEREFORE ENTITLED TO THE ENTIRE FREIGHT ON THE NEW DECK CARGO SUBJECT TO THE EQUITABLE PRINCIPLES OF GENERAL AVERAGE.**

In our statement of facts we, among other things, stated that on the loading of the original lumber cargo, the charterer sold the same C.I.F., with full shipping documents attached, to Smith, Kirkpatrick & Co., the assignor of St. Paul Fire & Marine Insurance Co., the appellee herein. This statement is founded on

the deposition of James W. Smith, the President of Smith, Kirkpatrick & Co., taken on behalf of the appellee, at pages 2 and 3 of the deposition. By inadvertence on the part of the appellee, the testimony was omitted from the requirements of the stipulation for the transcript on appeal herein.

Considering that we are entitled to a statement of the true facts, and feeling that counsel for appellant must be of like mind, we quote the portion of the testimony with respect thereto:

"Q. In May, 1920, did you purchase a cargo of lumber on the schooner 'Rosamond'?

A. The purchase preceded that.

Q. Shortly prior to May, 1920, you purchased such a cargo?

A. Yes.

Q. What was the voyage of that schooner?

A. From the Pacific coast to Capetown.

Q. From Fort Blakeley, Washington, to Capetown, South Africa?

A. Yes.

Q. From whom did you purchase that cargo?

A. Comyn, Mackall & Company.

Q. What were the terms of that purchase?

A. Why, it was subject to sight draft c.i.f., with full shipping documents attached."

The same witness also made an affidavit in the above cause, which is not part of the record, but is called to the attention of the Court for the same reasons as the testimony in the deposition above referred to. It reads in part:

"In May, 1920, Smith, Kirkpatrick & Co., Inc., purchased from Comyn, Mackall & Company a

> full cargo of lumber under deck and on deck, on the American Schooner 'Rosamond' from Port Blakeley, Washington, for Capetown, South Africa. Smith, Kirkpatrick & Co. purchased from Comyn, Mackall & Co. full c.i.f. documents including charter party covering the cargo and the voyage, which charter party had been made by Comyn, Mackall & Co. with the owner of the schooner. Under that charter party full freight was due and fully earned on the shipment of the cargo."

The stipulation of facts on which the cause was submitted recognizes the situation as testified to by the witness Smith, for it recites in its introductory portion:

> "Where the respondent's and cross-libelant's (Pacific Freighters Company's) vessel loaded an entire cargo of lumber including a deck load, belonging to libelant's assignor, (Smith, Kirkpatrick & Co.) as per charter party marked 'Exhibit A' and bills of lading in the form marked 'Exhibit B' * * *".

The charter party, under such a state of facts, as appellant must agree, was the contract between Smith, Kirkpatrick & Co., appellee's assignor, and Pacific Freighters Co., the appellant. Indeed, so far as the question of law is concerned, the appellant was in agreement with the appellee when it objected to the argument under the present heading presented to the lower Court. It, however, took the position on the facts that Comyn, Mackall & Co. were the charterers and therefore the bill of lading was the contract.

That Smith, Kirkpatrick & Co. was the party of the second part under the charter party, by virtue of the C.I.F. contract which carried with it the contract of charter party can hardly be gainsaid.

The charter party provides that the charterer shall have the "whole of the said vessel, including deck", and it further provides "that no goods or merchandise shall be laden on board otherwise than from the said party of the second part or their agent."[11]

As the assignee of the original charterer, Smith, Kirkpatrick & Co., appellee's assignor, was entitled to all the rights that the charterer had to the space in the carrying vessel. The space available as the result of the jettison was therefore the property of appellee's assignor and the freight on any cargo that was loaded therein was the freight of appellee's assignor.

Confirmation of this position is

The Port Adelaide, 62 Fed. 486, C. C. A., 59 Fed. 174 District Ct.

By the terms of the charter party in that case, the whole cargo capacity of the vessel was chartered to the libelant therein. The Circuit Court of Appeals for the Second Circuit held:

> "Under such a contract the master had no right without the permission of the libelant, express or implied, to use the vessel upon any part of the voyage for carrying cargo for third persons. Having done so, however, and earned freight thereby, the libelant, if he saw fit to adopt the

11. Charter Party, lines 10, 11 also Clause A, lines 24, 25; Ap. p. 74.

master's act, became entitled, upon the plainest principles of law to the freight earned."

Inasmuch as the new freight was earned as the result of the general average act, and as under general average, parties interested in the common venture may not profit one over the other by reason thereof, the new freight must be first subjected to the payment of the general average charges and the balance thereof divided between the parties to the venture—the ship owner, and the charterer, who is the cargo owner, the appellee's assignor.

As it did in the Court below, we anticipate that the appellant will attempt to distinguish the case of *The Port Adelaide,* on the basis that the charter in that case was a lump sum charter, and claim that in the instant case the charter is not lump sum, but for a unit price. However, such a criticism is not of avail, for the charter in the instant case is in fact a lump sum charter although it provides for a payment at so much per thousand feet. The payment stipulated for is, however, "for each 1,000 feet *shipped",* the word "delivered" having been stricken from the charter.[12] It further stipulates that the payment is "for the use of the said vessel during the voyage aforesaid". "The whole of said vessel including the deck * * * no goods or merchandise shall be laden on board otherwise than from" the charterer, the charterer to load a full cargo of lumber.

12. Charter party, Clause G; Ap. p. 74.

See

Poor on Charter Parties, Sec. 31, page 75,

and authorities there cited, as follows:

> "Section 31. *Lump sum freight.* When the freight payable is a lump sum for the voyage, the charter is in effect a hiring of the ship, and full freight is due though some of the cargo is lost on the voyage. The contract must clearly show that the freight is not to be paid on the amount of cargo delivered. But a stipulation that freight is to be paid upon the weight *intaken* shows an *agreement for a lump sum freight* even though freight is not payable until right delivery; and the same result is reached if the amount of cargo on which freight is to be paid is specifically stated in the contract."

See, also,

Christie v. Davis Coal and Coke Co., 95 Fed. 837; affd. 110 Fed. 1006.

Quoting the syllabus:

> "A charter of a ship to be loaded entirely with coal for a given port which provides for the payment of freight at so much per ton on the 'quantity intaken' is in the nature of a lump sum charter * * *."

7. THE MASTER MUST BE PRESERVED AS AN IMPARTIAL AGENT, UNFETTERED BY CONFLICTING INTERESTS, WHEN IT DEVOLVES UPON HIM TO DETERMINE WHICH INTEREST IS TO BE SACRIFICED.

There is another element in this case that should not be lost sight of. It is well expressed by the Circuit Court of Appeals for the Third Circuit in

The Mary F. Barrett, 279 Fed. 329:

"In the face of imminent danger, the law, as we have said, makes the master the agent of every part of the whole venture, to determine the question whether the sacrifice of any part may save the others. *The law having thus made the captain the agent of all, it follows that the law must make him an impartial agent; for it is evident that, if this law-imposed agent is by the law itself so fettered with partiality that if by doing nothing he can shield the ship from responsibility, and by acting he imposes responsibility on the ship, the law has created an agent whose bias unfits him for his work.* If the ship is seaworthy, and fault of navigation has, as in the present case, placed her on the rocks, and the master knows the ship is by the Harter Act not responsible for his negligence, *what but a biased mind can the master bring to deciding the question of jettison, if the law be that such jettison, if made, will subject the ship to pay the jettison loser in full, because of the fault which stranded the ship?* Such a construction would shear the master of the spirit of impartiality, fill him with the biased jaundice of interest, and unfit him to make the impartial sacrificial decision on which the safety of life, ship and cargo so often depend. *It is only by rejecting such construction, the law can inspire an impartial, disinterested master agent* with that 'honest intent to do his duty', which duty Justice Clifford bespoke for a master in The Star of Hope, 9 Wall. (76 U.S.) 203, 19 L. Ed. 638 * * *".

Applying this observation, so forcibly expressed, to the present case, we ask: "What but a biased mind

can the master bring to deciding the question of jettison", when he is faced with the alternatives of sacrificing ship's equipment and apparel on the one hand, or cargo (whether it be under deck or on deck, with freight prepaid considered earned)? Such a master, knowing that the freight on the cargo is earned in any event, might refrain from sacrificing his ship's equipment and apparel, and sacrifice the merchant's cargo by jettison, retaining to his owner the entire freight for the voyage, as well as his owner's vessel intact. Added to this, he would also have before him the facility of filling the space of the jettisoned cargo with new cargo on which new freight would be earned entirely for his owner's account. Such a master, if we but consider ordinary human failing, might readily be "an agent whose bias unfits him for his work", shorn "of the spirit of impartiality", filled "with the biased jaundice of interest" and unfitted "to make the impartial sacrificial decision on which the safety of * * * ship and cargo so often depend."

It is therefore imperative, not only in this case but in all cases of like character, that even though freight on cargo be prepaid considered earned, and the shipping contract call for the application of the York-Antwerp Rules of 1890, that freight received on new cargo shipped at a port of distress in space formerly occupied by jettisoned cargo should be credited in general average to the vessel and saved cargo. This is in consonance with the principle of the law of general average, and the decree of the lower Court is in

conformity therewith. Only thus can the master of the vessel be preserved as an impartial agent, unfettered by conflicting interests.

8. APPELLEE IS NOT BOUND BY THE ADJUSTMENT.

While the appellant has in its brief made no point with respect to the average agreement[13] signed before delivery of the cargo at destination, recognizing that it raised a question with respect thereto in the lower Court we will nevertheless briefly discuss the matters with relation thereto. The agreement contains the following proviso:

> "* * * provided that such losses and expenses shall be stated and apportioned in accordance *with the established usages and laws* in similar cases."

It is the position of the appellee that the findings of the adjuster are contrary to law, that they are erroneous. Under such circumstances the adjustment must be set aside. It is not binding on the parties thereto.

The Circuit Court of Appeals for this Circuit, in *Minor v. Commercial Union Assurance Co.*, 58 Fed. 801,

had under consideration the following stipulation:

> "We the undersigned do hereby consent that an adjustment of the loss on the barkentine Marion, which occurred February 18th, 1890, may be made by C. V. S. Gibbs, adjuster, on the following basis * * *. This stipulation applies to

13. Average agreement, Ap. 76-79.

general average adjustment only. *We agree to abide by adjustment made on above basis.*"

This Court held that where the adjusters had made an adjustment in a manner contrary to the law, it would be set aside, remarking:

"It follows as a conclusion from these premises that the adjustment was erroneous in assessing the contribution due in general average on the freight on its gross value, instead of taking one-half of such value, as provided by law; and the respondent is therefore entitled to a judgment dismissing the libel, and it is so ordered."

THE DISTRICT COURT WAS CORRECT IN THE PRORATING OF THE GROSS FREIGHT.

The appellant shipowner was bound to carry forward the saved cargo to destination. To quote from the text of

Carver on Carriage of Goods by Sea, 8th Edition, Sec. 302, at page 459:

"If, however, the ship can be repaired without unreasonable sacrifice on the part of the ship owner, and funds for the purpose can be procured, then he is bound to repair her; and, having done so, *is bound to carry on the goods to their agreed destination.* He has not in that case been prevented, in a business sense, from performing his contract."

In refitting the vessel in order that she might go forward to destination, the appellant, notwithstand-

ing its suggestion on page 16 of its brief, not only did not expend the sum therein named for refitting her, but such expenditures as were in fact made were not for the purpose of carrying the new cargo forward. The expenditures as made were for account of carrying forward the saved cargo, in compliance with its legal obligation so to do. So, too, were the attendant expenses of the voyage necessitated by the obligation to go forward to destination. This being so, the District Court properly ordered the gross freight prorated, not the net freight.

Before concluding our brief, this Court is entitled to know that since the rendition of the interlocutory decree, appellee has been of the opinion that the appellant was judgment proof, and that therefore it was not warranted in going to the expense of further proceedings. It is for that reason that the present litigation covers such a considerable period of time. Appellee is still of the opinion that no judgment can be satisfied against the appellant. The appellant, however, seeking as it does a reversal of the decree herein and a recovery against the appellee on its cross-libel, brought the proceedings in the lower Court to finality.

CONCLUSION.

We respectfully submit that the decree of the lower Court, which ordered the prorating of the gross new freight between ship and salved cargo in accordance with the provisions of its decree, should be affirmed.

Dated, San Francisco,
November 3, 1939.

Respectfully submitted,
IRVING H. FRANK,
NATHAN H. FRANK AND IRVING H. FRANK,
Proctors for Appellee.

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No. 9244

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHTERS COMPANY
(a corporation),
Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY,
Appellee.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

APPELLANT'S REPLY BRIEF.

1. THE NEW FREIGHT SHOULD NOT BE PRORATED BETWEEN THE VESSEL AND HER CARGO IN GENERAL AVERAGE.

The appellee impliedly concedes our statements that this is the first case in which this question has been presented to a court,[1] that general average relates to *contribution* in order to make good *loss, damage* or *expense,* that such is the ordinary definition used both by lawyers and lexicographers, and (save for one discussion upon which appellee relies but which we shall show is not to the contrary[2]) that the literature of the subject is barren of any suggestion that a receipt, gain or profit is to be distributed.

[1]Opening Brief, p. 12.
[2]Infra, pp. 4-7.

In two cases prior to the instant case, such a claim was made and rejected by the adjusters. In neither case did the claimant press the point in court.

In *Fletcher v. Alexander* (1868), L. R., 3 C. P. 375,[3] the determination of this question by the adjuster was in accord with the view taken by the adjusters in the instant case. Lowndes[4] expressed his approval of this ruling. Appellee proposes[5] that the case be distinguished because in that case the voyage terminated with the general average sacrifice while in the instant case the voyage was continued. The distinction is unsubstantial. The equities and inequities are the same in either case. The same *principle* was applied by the English adjusters as by those who acted here.

We quoted[6] from the opinion of J. Parker Kirlin, Esq., in the *Pinar del Rio* case. The portion which we quoted dealt with "cargo jettisoned" and is directly in accord with the action of the adjusters in the instant case. Appellee does not question that Mr. Kirlin expressed this opinion and that it fits the facts of the instant case. It quotes, however, a portion of his opinion dealing with "cargo transshipped from Miami,"[7] apparently seeking thereby to establish some inconsistency in Mr. Kirlin's expressions. There is no such inconsistency. Where cargo is jettisoned under the circumstances of the *Pinar del Rio* and the instant case, the denial of any right of the cargo owner to share in new freight is quite consistent with

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[3]Opening Brief, pp. 13-14, Appellee's Brief, pp. 18-20.
[4]General Average, 6th Edition, p. 109.
[5]Appellee's Brief, pp. 18-20.
[6]Opening Brief, pp. 14-16.
[7]The whole of this division of the opinion is appended as Appendix A.

Mr. Kirlin's view regarding the transshipment cost. The essence of the matter lies in the difference between freight at risk in the venture and freight not at risk because of a stipulation such as that in the charter party here that the freight should be earned, vessel or cargo lost. The point of Mr. Kirlin's opinion about the transshipped cargo was that since the vessel owner was under obligation to transship, his expense in this connection was a loss, against which he had to *credit* the new freight. Apparently, appellee quotes this passage of Mr. Kirlin's opinion to suggest that Mr. Kirlin approved in that instance the affirmative distribution of a profit in general average. His language is not susceptible of this interpretation. Mr. Kirlin's decision was that the new freight should be accounted for "so as to *offset* wholly or *as far as it will go*" the cost of transshipment. There is nothing in the opinion to suggest that an affirmative payment was to be made to the cargo owner of some portion of the new freight.

To balance Mr. Kirlin's opinion, appellee quotes from a letter of one of its advocates in the instant case. It is only fair to say that this letter is the expression of the hope of a sanguine advocate rather than an impartial decision of questions submitted. The character of the communication may well be judged by a consideration of those portions which appellee has omitted from its quotation. The letter concludes:

> "Whether or no we can make good this contention, it does seem that we should be able to at least make it good to the extent of eliminating the claim for $4,694.22 charged to the cargo, because the ship-owner has lost nothing, and by the present adjustment would

be a gainer to the extent of about $21,000.00 by having put into a port of distress.[8]

Under any view of the foregoing, the amount involved, and the inequity of the claim, would seem to warrant us in making the attempt.

So far as your remedy is concerned, I am inclined to the opinion that we should bring an action against the vessel for contribution in general average under the foregoing theory, and in such action, we might adopt the present adjustment as a basis, and ask the Court for such a sum as, by the amended adjustment upon the foregoing principle, the cargo may be entitled to. According to my present information, there should be a net cash balance due the cargo-owner of $7,224.72, instead of a charge against him of $4,694.22.''

The letter really adds nothing to advocate's brief in this court. It is simply based upon the passage quoted from Gourlie[9] which was misapplied by the writer of the letter in the same way that it is by the writer of the brief.

The only published matter to which appellee points, as a suggestion that a receipt, gain or profit may be distributed in general average, is a report of some proceedings at which proposed amendments of the York-Antwerp Rules were considered.[10] As appellee says, the proposed paragraph was rejected. Appellee is mistaken, however,

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[8]The statement that the shipowner ''lost nothing'' and is a ''gainer'' under the present adjustment to the extent of about $21,000 is hardly a fair estimate of the actual situation. At the port of refuge, appellant was required to expend far more than the amount of the new freight to repair the storm damage and to fit the vessel to proceed on her voyage (Ap. 97). This expense was particular average to which the cargo did not contribute in any way.

[9]Appellee's Brief, p. 15, infra, p. 8.

[10]Appellee's Brief, pp. 9, 22-23, 1924 A.M.C.

in its view that even the proposal of this paragraph was a suggestion that the law of general average be changed so as to permit the distribution of a receipt, gain or profit. The meaning of the rejected paragraph is clear when it is considered in connection with the remainder of Rule XV as proposed at the Stockholm conference. The proposal was to amend Rule XV to read:

"RULE XV.—Loss of Freight.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

When the voyage is continued, credit shall also be given for freight earned on goods carried in lieu of goods sacrificed, less expenses actually incurred in earning such freight, including an allowance for extra detention of the vessel due solely to the engagement and loading of the new cargo."

So modified, Rule XV would have expressed the law just as stated by us in our opening brief. The rule would deal with the subject "Loss of Freight." Every sentence of the rule would be limited to this subject. A loss of freight can occur only where the freight is at risk, that is, where the freight has not been absolutely prepaid as it was in this case. The proposed Rule XV then would provide that where the freight had been at risk and was lost by a general average sacrifice and was to be made good in general average, then when the voyage continues

credit shall be given for net new freights. The proposed paragraph did not deal with a case as here where the freight was absolutely prepaid, there was no freight at risk and therefore there could be no loss of freight to be made good in general average. The proposed paragraph did not apply to a case as here where under the first York-Antwerp Rule (1890) the jettison of the deck cargo was not to be made good in general average and therefore no loss of deck cargo freight could be made good in general average. The proposed Rule XV would mean nothing different from the law as already expressed by us, that where the freight was at risk and its loss made good in general average, that loss "would have been reduced by the net amount of the new freight,"[11] but where no loss of freight was to be made good in general average there could not be an affirmative distribution of the profit from the new freight. The proposed paragraph to be included in Rule XV only provided for a *credit* of the net new freight against the loss of the old freight. It did not provide for an affirmative distribution of the freight received. All this is made particularly clear by the discussions which took place under the auspices of the Chamber of Commerce of the United States regarding the use of the 1924 rules by American merchants. At the New York meeting, April 23, 1925, a recommendation from the Merchants Association of New York was submitted which urged the very paragraph rejected at the Stockholm conference, upon which appellee relies so strongly. Explaining this recommendation, that committee urged that

[11]Opening Brief, p. 12, citing Baily, General Average, 2d ed., p. 134; Lowndes, General Average, 6th ed., pp. 348, 783; see also Opening Brief, p. 18.

> "* * * where allowances are made in general average for loss of freight and the space occupied by goods destroyed is subsequently filled by other cargo and freight thereon earned, the net freight, after allowing for the expenses and loss of time to the ship, should go to the reduction of general average loss" (Report of Proceedings of American Committee on General Average Rules, April 23, 1925, p. 10).

Subsequent discussion made it clear that the practice of American adjusters is in accordance with the principles laid down in our opening brief and above.

> "*Mr. Congdon* stated that the present practice is to credit new freight to the General Average when the original freight was collect, but not to credit it when the original freight was prepaid" (Report of Proceedings of American Committee on General Average Rules, April 23, 1925, p. 16).

The difference between adjusters which the Stockholm conference did not resolve, did not concern the question involved in the instant case of distributing the new freight received by the shipowner where the old freight had not been at risk, but whether the practice of American and English adjusters, where freight had been at risk, of crediting against a loss of freight the amount of any net substituted freights, should be crystallized in the rules so as to override contrary practices of the adjusters of other countries.

So far as those texts which appellee cites deal with this question of new freight, they are in accord with the law as above expressed.

Thus, Congdon[12] simply says that:

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[12]General Average, 2nd Edition, p. 64, Appellee's Brief, pp. 8, 23.

> "* * * the net freight earned on the new cargo should be *credited against the allowance for freight on the cargo sacrificed.*"

He does not say that where there was no freight at risk and where there was no allowance to the shipowner for freight on cargo sacrificed, the net new freight was to be taken from the shipowner and distributed. Nothing in Congdon suggests the distribution of a "general average profit."

The same is true of the passage from Gourlie upon which counsel's opinion is based.[13] "The new freight," says he, "cancels the loss that would otherwise arise from the original sacrifice." On the same page, he says: "An absolutely prepaid freight does not *eo nomine* contribute; neither is it contributed for." In such cases, there could be no "loss" for the new freight to "cancel." The first sentence of the quotation, "The shipowner may not by the jettison be in anywise a gainer," must be read in view of the rest of the paragraph and the captions under which it stands, "The method of ascertaining the amounts to be made good,"[14] and "allowances for freight."[15] It means that the shipowner may not obtain an allowance for loss of freight, and then pocket the profit on new freight for substitute cargo. Nowhere does Gourlie suggest that a "general average profit" may be distributed.

The various sections cited by appellee from Carver[16] fail to sustain the argument that profits are to be dis-

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[13]Supra, p. 4.
[14]Page 462.
[15]Page 486.
[16]Carriage by Sea, 8th Edition,
section 375, p. 547, Appellee's Brief, pp. 9, 20;
section 403, p. 575, Appellee's Brief, pp. 9, 21;
section 415, p. 591, Appellee's Brief, pp. 8, 14.

tributed in general average. They deal solely with contribution to make good sacrifices. Nothing in Carver's book intimates anything about the distribution of profits.

Appellee also relies upon Lowndes on General Average, 6th Edition. The quotation[17] is from *Fletcher v. Alexander.* It deals simply with contribution to make good a loss, not with distribution of a profit. The same is true of the second quotation.[18] It relates to the determination of the *contributing interests* and has nothing whatever to do with *distribution of profits.* This matter of contributing interests is also the subject of the third quotation.[19] As we have said,[20] throughout his book Lowndes is consistent in describing general average as a matter of contribution to make good losses. Nowhere does he intimate that it is a matter of the distribution of receipts, gains or profits.

Appellee relies upon *The Strathdon,* 101 Fed. 603. The quotation, however,[21] is from the opinion of the District Court.[22] This was a suit for contribution to make good a general average sacrifice. The opinion cites[23] the classic definition of general average by the Supreme Court in *Star of Hope,* 9 Wall. 203, 228.[24] Nothing in that opinion nor in the opinion of the Circuit Court of Appeals suggests anything about distribution of a receipt, gain or profit.

Appellee cites *Williams v. The London Assurance Company,* 1 M. & S. 318.[25] This case involved the determina-

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[17]Lowndes, p. 308, Appellee's Brief, p. 14.
[18]Lowndes, p. 358, Appellee's Brief, pp. 8, 14.
[19]Lowndes, p. 377, Appellee's Brief, p. 24.
[20]Opening Brief, p. 13.
[21]Appellee's Brief, pp. 8, 13-14.
[22]94 Fed. 206.
[23]Page 208.
[24]Opening Brief, p. 13.
[25]Appellee's Brief, pp. 27-28.

tion of what were the interests which should contribute to make good a general average loss. Nothing in it suggests that general average involves the distribution of a profit.

In this connection, appellee also seems to rely upon *Barclay v. Stirling,* 5 M. & S. 6.[26] The case discusses no question of general average.

Appellee cites also *Chellew v. Royal Commission,* 2 K. B. (1921) 627.[27] This involved the question of what interests should contribute to make good a loss. It does not suggest anything about distributing a profit.

Considered as a whole, these authorities of appellee's confirm what we have said all along that general average relates to contribution in order to make good loss, damage or expense, not to the distribution of a receipt, gain or profit.[28]

Much of appellee's argument is devoted to a general charge of "inequity" against the adjustment,[29] the assertion that it gave appellant the advantage,[30] the complaint that it did not place the parties on an equal footing,[31] the claim that by it appellant "profited" over appellee.[32] All these things seem to have been said without giving consideration to the real equities of the parties. In the instant case, it is purely an accident that the deck cargo was sold to the same purchaser as the underdeck cargo. It is in the latter capacity alone that appellee asserts its

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[26]Appellee's Brief, p. 8, infra, p. 17.
[27]Appellee's Brief, pp. 8, 29-31.
[28]Opening Brief, p. 13.
[29]Appellee's Brief, pp. 10-12, 13.
[30]Appellee's Brief, pp. 12-13.
[31]Appellee's Brief, pp. 13-14.
[32]Appellee's Brief, p. 35.

claim in general average for a *distributive share* in the new freight. The equities of the rule for which appellee contends in its effort to support such a claim must be tested, not with reference to the accident of this case, in which the same man owned the deck cargo as the underdeck cargo, but with reference to the general situation where the deck cargo is owned by one and the underdeck cargo by another. In such a case, it must be obvious that no equity is served by giving the owner of the underdeck cargo a share in the new freight, the ability to earn which was created by the jettison of the goods of the deck cargo owner. The fact that the deck cargo owner has suffered a loss by the jettison cannot furnish a basis for giving the owner of the underdeck cargo a profit to the earning of which he has contributed nothing. Moreover, if, as appellee claims, the owner of the underdeck cargo is entitled to a share of the freight on the new deck cargo in the instant case, where the freights were absolutely prepaid, the same must be true where the freights are not absolutely prepaid. In such a case, if appellant's claims are to be sustained, the vessel owner would have lost the freight on the jettisoned deck cargo, but under the first York-Antwerp Rule (1890) would have been unable to recoup that loss through *contribution* in general average, and under the rule for which appellee contends, would be unable to make it good by shipping a new deck cargo without *distributing* a portion of the new freight to the owner of the underdeck cargo. The result of appellee's contentions in such a case would be to give the owner of the underdeck cargo an unearned profit and to make it impossible for the vessel owner to use his own property to make good his own loss. This demonstrates the essential inequity of the rule

for which appellee contends. Whatever inequity inheres in the adjustment actually made in this case, it is only apparent inequity. It does not arise by virtue of any error in the law of general average as applied by the adjusters, but is the necessary consequence of the provisions of the charter party voluntarily framed by the parties to the venture. In any case where freight is absolutely prepaid and the cargo is lost, an apparent inequity results. The inequity, however, is only apparent. The practical convenience of putting the transaction in that form has led commercial men to adopt that method of doing business. No real inequity results. Insurance problems are simplified. The vessel owner does not have to insure the freight. One policy carried by the cargo owner covers the whole risk. The "inequity" of which appellee complains here is simply the necessary consequence of the terms of the charter party. There is nothing wrong with the principles of general average applied by the adjusters.

Allied to this is the contention of appellee that the rule of general average must be as claimed by it in order to preserve the impartiality of the Master in considering a jettison.[33] In this connection, appellee cites *The Mary F. Barrett,* 279 Fed. 329.[34] Like other cases cited by appellee, that was a suit by the owner of jettisoned cargo in which the court ordered *contribution* to make good his *loss.* From the decision of the lower court,[35] it appears that both deck and underdeck cargo were jettisoned; nothing in either opinion shows whether or not the York-Antwerp

[33]Appellee's Brief, pp. 9, 36-39.
[34]Appellee's Brief, pp. 9, 37.
[35]270 Fed. 618.

Rules governed; the first York-Antwerp Rule (1890) was not involved. In the instant case that rule is involved. It is not necessary here to review the numerous reasons why shipping men framed that rule. It is sufficient to say that it provides expressly that no jettison of deck cargo shall be made good as general average.[36] The effect is, of course, that when jettison of deck cargo is concerned, the Master is not impartial. So far as the vessel owner's interests are concerned, under this rule it is always cheaper to jettison deck cargo than anything else. In the face of the first York-Antwerp Rule (1890), it is idle to talk of impartiality of the Master. By this, we do not mean that where shipments are made under charters embodying the York-Antwerp Rules of 1890 there is any disposition on the part of masters to sacrifice deck cargoes improperly. We cannot believe that ship masters in time of peril search through the vessel's records and read the fine print on the charter party. It is clear, however, that the owners of underdeck cargo are entitled to this advantage under the first York-Antwerp Rule (1890), that in determining whether or not to sacrifice a deck cargo and save an underdeck cargo, the Master shall not be troubled by the fear that his employer will have to pay a general average contribution to the owner of the deck cargo. If the adjustment in the instant case in any way deprives the Master of his ordinary impartiality, this is due, not to the principles of general average applied by the adjusters, but simply to the first York-Antwerp Rule (1890).

Appellee devotes a section of its brief to demonstrating that "the new freight was earned by a general average

[36]Appellee's Brief, p. 2, note 2.

act'' and makes similar assertions in other portions of its brief.[37] Rather frankly, appellee concedes that this is merely a verbal position, saying ''that while jettison was a general average act, the cargo jettisoned was not entitled to contribution because of the contract between the ship owner and the cargo owner, incorporating the York-Antwerp Rules of 1890, Rule 1 of which provides that no jettison of deck cargo shall be made good as general average.''[38] It must seem quite idle to discuss whether a particular ''jettison'' is or is not a ''general average act'' when all concede that no loss thereby occasioned may be made good in general average. The essential thing is that since the loss is not to be made good in general average, this in itself destroys every possible argument in support of appellee's claim that a profit thereby earned is to be distributed in general average.

Appellee evinces some disposition to confuse matters by various uses of the word ''benefit.'' In some way, this seems to be involved in appellee's argument that in determining contributing interests ''prepaid freight must be added to the value of the cargo.''[39] This last is an inaccurate expression. More nearly accurate is appellee's earlier phrase ''the saved cargo at its market value at the port of destination, which included the freight paid at the port of departure,''[40] that is, from which the freight was not deducted.[41] The difficulty about this word ''benefit'' is apparent when we find it used to describe:

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[37]Appellee's Brief, pp. 8, 13, 35.
[38]Appellee's Brief, p. 21.
[39]Appellee's Brief, p. 24; see also p. 10.
[40]Appellee's Brief, p. 10.
[41]See Apostles, p. 98.

(1) to the vessel owner

(a) the deduction of particular average repairs from the contributory value of the vessel,

(b) "the sound value of the vessel at Capetown ($75,000.00), less the cost of repairs,"[42]

(2) to the cargo, "the market value at Capetown,"[43] and

(3) "the new freight, a benefit received."[44]

The word "benefit" is frequently used in the literature of general average to denote the extent to which the general average sacrifice has resulted in the saving of the property not sacrificed. The contribution to make good the sacrifice is ordinarily computed in proportion to these "benefits." In this sense, the above usages (1)(b) and (2) are correct. If the word must be used in the senses (1)(a) and (3), it must be remembered that a different meaning is intended. Appellee's adoption of usage number (3) leads to a strange result. The new freight, says he, is one of the ultimate benefits of the voyage and that "freight must therefore contribute." If the freight is really one of the benefits like the saved cargo and the saved vessel, then it may be that as one of the contributing interests it should contribute to the general average expense at the port of refuge. There is nothing, however, in any principle of general average which requires that one of the contributing interests should be totally divided between the other two.

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[42]Appellee's Brief, p. 11.
[43]Appellee's Brief, pp. 11-12.
[44]Appellee's Brief, pp. 12, 24.

Speaking further of "benefits," appellee says that "the owner of the vessel received the benefit [of the particular average charges at the port of refuge] by having them deducted from the contributory value of the vessel."[45] This assertion exposes another fallacy in appellee's criticism of the adjustment, both from the standpoint of the equities of the situation and from that of the principles of general average.

It is true that the particular average charges at the port of refuge were deducted from the contributory value of the vessel, and that, by reason of this deduction, the amount of the general average expenses payable by the vessel was reduced. This was in accordance with the settled and equitable principle of general average that losses are proportioned to the values of the interests saved by the general average act. Under this principle the contributory interests pay *less* in proportion as their uncompensated losses are greater. But on appellee's theory that in addition to the contribution to make good the general average losses there should be a pro rata distribution of the new freight, the particular average losses which the vessel was unfortunate enough to suffer would become not a "benefit" but a positive detriment. Under this theory the vessel would receive a *smaller* amount of the new freight in proportion as its particular average losses were *greater,* while the cargo would recover *more* in proportion as its particular average losses were *less.* In the case at bar, the underdeck cargo suffered no damage whatsoever. Accordingly, under appellee's theory, it would share in the new freight in proportion to its full value. At the same time,

[45] Appellee's Brief, p. 11.

the vessel's share would be reduced in proportion to the large amount of particular average losses it suffered by reason of the disaster. This startling result demonstrates, we submit, not only the inequity of appellee's position, but also—as is held by all the authorities—that the principles of general average are applicable only to *contribution* for *losses,* and never were intended to, and cannot practicably and equitably, apply to the *distribution* of a *profit.*

Appellee advances one group of contentions quite inconsistent with its claim in this case. The burden of these two contentions is not that appellee is entitled to a distribution of a *portion* of the new freight, but that appellee's assignor was entitled to the *whole* of the new freight.

The first of these arguments is "that in prepaying the freight at the port of loading * * * the cargo owner virtually stands in the shoes of an insurer to the ship of the full freight of the vessel. As an insurer * * * the cargo owner would be entitled to have the new extra freight paid at the port of distress, credited to its liability for the full freight," citing *Barclay v. Stirling,* 5 M. & S. 6.[46] That was a simple insurance case. It involved no question of general average and no such question as is presented by this particular argument of appellee's, that appellee, as cargo owner, stands in the position of an insurer. Appellee's effort is to turn a charter party into an insurance policy, to ascribe to a charter party those incidents which arise out of a contract of insurance. In addition to *Barclay v. Stirling,* appellee cites Coe on General Average, p. 67, and Lowndes on General Average,

[46]Appellee's Brief, p. 25.

6th Edition, p. 783.[47] The works cited do not discuss this argument of appellee. All that can be said is that a charter party is one thing and an insurance policy is something else and that the incidents of one are not the incidents of the other.

But appellee has another and entirely different argument in support of its claim for the whole freight.[48] Appellee's discussion of this point is based upon one misapprehension of fact. Throughout the discussion, appellee says that the charterer sold the cargo to appellee's assignor, c. i. f.[49] As purchaser of the cargo under a c. i. f. contract, appellee then argues that its assignor became in effect the assignee of the charter party,[50] or even "was the party of the second part under the charter party."[51] In support of this contention, appellee quotes from a deposition *not in the Apostles,*[52] and from an "affidavit" *not in the Apostles,* NOT FILED IN THE LOWER COURT, not even signed by the witness, nor shown to counsel before it was mentioned in Appellee's Brief.[53] If the matter be material, then so far as the deposition is concerned, the court may care to know that the passage immediately following appellee's quotation from the deposition contradicted the quotation. The next question and answer were:

> "Q. How was the insurance arranged? A. We stipulated, at the time of purchase, that we should be

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[47]Appellee's Brief, p. 27.
[48]Appellee's Brief, pp. 9, 31-36.
[49]Appellee's Brief, pp. 5, 31, 32, 33 and 34.
[50]Appellee's Brief, p. 34.
[51]Appellee's Brief, p. 34.
[52]Appellee's Brief, p. 34.
[53]Pages 32-33.

allowed to provide our own cover, subject to suitable allowance in respect to the premium which they had included in their c. i. f. price.''[54]

That is, the sale was not c. i. f., but "c. & f." The pleadings do not allege a c. i. f. sale, but simply that the charterer "sold and transferred said cargo to said Smith, Kirkpatrick & Co., Inc."[55] The sales contract is not before the court. There were several bills of lading.[56] If these bills of lading had been assigned to different purchasers, which purchaser would have been assignee of the charter party? Where a charter party and bills of lading are held by separate parties each constitutes a separate contract, with different rights and liabilities.

Field Line (Cardiff), Limited, v. South Atlantic S. S. Line, 201 Fed. 301.

This is true where a bill of lading issued to a charterer has been endorsed to another.

Leduc v. Ward (1888), 20 Q. B. D. 475, 479;

The Fri, 154 Fed. 333, 336-337.

The charterer itself could not have shipped additional cargo without paying additional freight. Its successor in business did ship additional cargo,[57] paid the additional freight, and then sold the additional cargo to libelant's assignor.[58] Appellee relies upon *The Port Adelaide,* 62 Fed. 486, 59 Fed. 174,[59] as holding that the charterer had the right to ship additional cargo free. This was true in that case because the charter fixed the freight at a flat

[54]Page 3.
[55]Apostles, p. 3.
[56]Stipulation for Submission of Cause, Ap. p. 70.
[57]Apostles, pp. 68-69.
[58]Apostles, pp. 43-45.
[59]Appellee's Brief, pp. 9, 34-35.

sum irrespective of the amount shipped.[60] Our charter fixed the freight at $52.50 per thousand feet shipped. It resembles the charter of *The Wergeland,* 262 Fed. 785. That case was similar to the instant case, save that the vessel owner took on additional cargo, not from the charterer, as here, but from a third party, not at the charter freight, as here, but at a higher freight. The vessel was held accountable to the charterer, not for the whole new freight, but only for the profit on that freight over and above the charter rate which the charterer would have had to pay. Nothing in the authorities cited by appellee, *Poor on Charter Parties,* Sec. 31, page 75, or *Christie v. Davis Coal and Coke Co.,* 110 Fed. 1006, 95 Fed. 837,[61] is contrary to this.

Both of these theories upon which appellee asserts its assignor's right to the whole new freight, rather than a proportion of it to be obtained in general average, resemble the contention originally advanced by appellee,[62] not only in their general nature, but also in the fact that they are quite inconsistent with the demand here asserted for only a portion of the new freight to be distributed in general average. This contention of appellee's at the outset was characterized by its assignor as "intolerable delay,"[63] "raising one question after another,"[64] and "a totally new contention which is wholly contrary to the views held by all our adjusters and other Underwriters here."[65]

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[60]59 Fed. 175.
[61]Appellee's Brief, p. 36.
[62]Apostles, pp. 45-46.
[63]Apostles, p. 46.
[64]Apostles, p. 43.
[65]Apostles, p. 43.

The foregoing, we submit, has demonstrated the unsoundness of contentions of this sort. *But even if they were sound they could not avail appellee.* The most they could show would be a cause of action in favor of appellee's assignor inconsistent with appellee's theory in this case and not available to the appellee because the assignment to appellee only covered moneys due in general average.[66]

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2. IN ANY EVENT, THE ONLY THING TO BE CONSIDERED SHOULD BE THE NET FREIGHT, NOT THE GROSS FREIGHT.

Appellee does not question the authorities cited by us[67] to the effect that in general average consideration is given only to net freight after deducting subsequent expenses incurred to earn it. This is made even clearer by the proposed addition to the York-Antwerp Rule XV considered at the Stockholm conference upon which appellee relies so strongly. This relates to "freight earned on goods carried in lieu of goods sacrificed, *less expenses actually incurred in earning such freight,* etc."[68] When quoting this paragraph in another connection, appellee appends a note that it will "hereafter indicate" why this language does not defeat its claim for the *gross* freight. The promise is not fulfilled. Appellee's discussion of this point[69] seems to concede the legal principle upon which we rely and to be based upon a contention that as a matter of fact there were no expenditures in earning the new freight. Of course, such a contention

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[66]Apostles, p. 14.
[67]Opening Brief, pp. 18-20.
[68]Appellee's Brief, p. 22.
[69]Appellee's Brief, pp. 40-41.

of fact cannot justify the action of the District Court in prescribing that only the gross freight should be taken into account, thus foreclosing appellant from establishing the expenses. Nevertheless, the record does show that there were expenses attributable solely to the carriage of the new deck cargo. There was a managing commission,[70] an allowance to the charterer for transporting the cargo to San Francisco for loading instead of loading at Puget Sound,[71] the cost of loading the new cargo,[72] tallying it,[73] storage on it,[74] and part of the crew's wages and provisions during the time they were waiting for and loading the new cargo.[75] Appellee is simply in error if he means to express the contrary by his statements that "the expense incurred * * * related to the saved cargo,[76] that the "expenditures * * * made were not for the purpose of carrying the new cargo forward."[77] Appellee cites Carver.[78] Nothing in what this author says indicates that as a matter of law, gross freight is to be considered. In another portion of his work,[79] this author makes it clear that net freight is to be considered just as stated in the authorities cited by us.[80]

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[70]Apostles, p. 68.
[71]Apostles, p. 69.
[72]Adjustment, p. 80.
[73]Adjustment, p. 82.
[74]Adjustment, p. 124.
[75]Adjustment, p. 154.
[76]Appellee's Brief, p. 10.
[77]Appellee's Brief, p. 41.
[78]Sec. 302, p. 459, Appellee's Brief, pp. 10, 40.
[79]Section 436, p. 613.
[80]Opening Brief, pp. 18-19.

3. CONCLUSION.

We respectfully submit that the adjustment made in this case is in accordance with the authorities, that there is no contrary authority, that it is in accordance with the practice of American and English Adjusters and the advisers of appellee's assignor,[81] and that it is equitable and fair, and therefore that the decree should be reversed.

Dated, San Francisco, California,
November 13, 1939.

Respectfully submitted,
FELIX T. SMITH,
FRANCIS R. KIRKHAM,
Proctors for Appellant.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

(Appendix A Follows.)

[81] Supra, p. 20.

Appendix A.

Appendix A

EXCERPT FROM OPINION OF J. PARKER KIRLIN, ESQ., IN THE PINAR DEL RIO.

(See footnote 7, p. 2, supra.)

d. Cargo transshipped from Miami. That cargo was in such condition that after the ship was repaired she might have reloaded it by having it brought out to her in barges. It was, however, considered less expensive and for the best interest of all to have it transshipped. The expense of transshipment was obviously due to a general average act, and, therefore, constitutes a general average charge. The original freight on the cargo which was subsequently transshipped was paid in exchange for an obligation of the shipowner to carry forward and deliver that cargo unless prevented by unexpected perils. The bill of lading did not provide that the shipowner could keep the freight without performing the obligation of carriage, except in one of two contingencies: 1, the loss of the ship, or, 2, the loss of the goods. As neither of these things occurred with reference to the cargo transshipped from Miami, the ship remained under an obligation to reload that cargo after being repaired, and carry it forward, or, in the special circumstances, to bear her ratable share of the cost of forwarding it. The net freight on new cargo shipped in the space occupied by the cargo so transshipped must, therefore, in some form or manner, be accounted for in general average, so as to offset wholly, or as far as it will go, the general average expenses in connection with the forwarding. The shipowner will be debited in the general average with his proportion of the cost of transshipment, but against this charge he will receive a credit, through the medium of general average, of his ratable proportion of the net freight on the fresh cargo shipped in place of it, which, presumably, will wipe out the debit.

No. 9251

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS, and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana—Great Falls Division.

In Equity—No. 3053.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS, and FRANK E. NELSON,

Interveners,

vs.

BRADY IRRIGATION COMPANY, a corporation,

Plaintiff,

and

WINSTON BROTHERS COMPANY, a corporation, TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation, and BYNUM IRRIGATION DISTRICT, a public corporation,

Defendants,

and

C. K. MALONE,

Intervener,
Respondents.

Be It Remembered, that on July 21, 1937, a Complaint and Petition for Declaratory Judgment was duly filed herein, being in the words and figures following, to-wit: [2]

[Title of District Court.]

BRADY IRRIGATION COMPANY,
a corporation,
Plaintiff,

vs.

WINSTON BROS. COMPANY, a corporation; TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation; and BYNUM IRRIGATION DISTRICT, a public corporation,
Defendants.

COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT.

The Plaintiff, for its cause of action against the above named defendants, complains and alleges:

1.

That during all the times herein mentioned, the defendant Winston Bros. Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and is a citizen and resident of the State of Minnesota.

2.

This is a suit in equity of a civil nature and is a case of actual controversy. The matter in controversy exclusive of interest and costs exceeds the sum of Three thousand dollars ($3000.00).

3.

That heretofore the above named plaintiff did, in writing, request and demand that said defendants, Teton Cooperative Reser- [3] voir Company, a corporation, and Bynum Irrigation District, a public corporation, and each of them, join the plaintiff as parties plaintiff in this action, but each of said defendants have heretofore refused and still refuse to join the plaintiff herein as a party or parties plaintiff in this action for the purpose of litigating the controversy as set forth herein.

4.

That during all the times herein mentioned, the above named defendant Bynum Irrigation District was and now is a public corporation of the State of Montana organized and existing and operating as an irrigation district under and by virtue of Chapter 146 of the Laws of 1909 of said State, and Acts amendatory thereof and supplemental thereto, and is a resident and citizen of the State of Montana, with its principal place of business at Bynum, Montana.

5.

A. That the plaintiff during all the times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, and is a resident and citizen of the State of Montana, with its principal place of business at Brady, Montana, and was organized and has been operating solely and only for the pur-

pose of delivering water for irrigation and domestic purposes to its stockholders, and has been operated as a co-operative association and not for profit.

B. That no dividends have been paid by the plaintiff corporation to its stockholders, or earned, and the only income which it has is obtained from assessments levied against the outstanding capital stock consisting of 500 shares of the par value of $100.00 each, and the proceeds from sale of the capital stock and said assessments have been devoted solely and only to the construction and maintenance of canals, ditches, dams, headgates and other improvements used for the purpose of conveying and diverting waters thru its own water rights from which is known as Muddy Creek in Teton County, Montana, and thru [4] the purchase of capital stock as hereinafter set forth from the reservoir of said Teton Co-operative Reservoir Company, for irrigation and domestic purposes to stockholders of said plaintiff corporation; that each share of the capital stock of said plaintiff corporation entitles the owners to the use, during the irrigating season of each year, of 1/500 part of the waters owned and diverted by plaintiff and particularly of the waters received from the said reservoir of said defendant Teton Co-operative Reservoir Company, to which plaintiff is entitled by reason of its ownership of 156 shares of capital stock of said Reservoir Company.

C. That the plaintiff during all the times herein mentioned, has been and now is the owner of said 156 shares of capital stock of said Teton Co-operative Reservoir Company of the par value of $150.00 per share, and is entitled at all times to 156/1000 part of the waters of said Teton Co-operative Reservoir Company delivered to plaintiff at the headgates of said Reservoir, as is hereinafter more particularly set forth.

D. That Article V of Section VI of the By-laws of the plaintiff corporation, which is now and at all times herein mentioned was in full force and effect, reads as follows:

> "Each share of the five hundred shares of the capital stock of this corporation represents and controls for such share, one five-hundredth part of all the waters appropriated and diverted by this corporation, and the owner of record of any share is entitled to control the use of said proportion of said waters of this corporation subject to such rules and regulations as may be hereafter adopted by said corporation or its board of directors.

That all of the said 500 shares of the capital stock of the above named plaintiff, have at all times herein mentioned, been, and now are, issued and outstanding.

6.

That during all the times herein mentioned, the above named defendant Teton Co-operative Reservoir Company was and now is a corporation duly organized and existing under and by virtue of the [5] laws of the State of Montana, and is a citizen and resident of said State of Montana with its principal place of business at Bynum, Montana, with a capital stock of 1000 shares of the par value of $150.00 each, all of which is now and was at all times herein mentioned issued and outstanding.

That said defendant Teton Co-operative Reservoir Company ever since its organization has been and now is operated solely and only for the purpose of delivering water for irrigation and domestic purposes, and particularly for the irrigation of lands owned or controlled by the stockholders of said corporation, and said corporation has at no time been, nor now is operating for profit; that the only income which said last mentioned corporation has ever received has been from assessments levied against the outstanding capital stock of said corporation, and the proceeds from the sale of its capital stock and said assessments have been used solely and only for the purpose of maintaining, constructing and repairing the reservoir hereinafter particularly described, and the canals and ditches conveying water to said reservoir; and constructing, repairing and maintaining canals and ditches for the purpose of delivering water at its headgate to its

stockholders, at cost, for irrigation and domestic purposes.

7.

That during the year 1918 a by-law was adopted by the written consent of the holders of all of the capital stock of said company, then issued and outstanding, to-wit 1000 shares, and filed in the office of the Secretary of said corporation, and duly copied in the book of by-laws of said corporation, and by reason whereof the same was duly and regularly adopted by the stockholders of the above named defendant, Teton Cooperative Reservoir Company, providing among other things as follows, to-wit:

> "A-1. Except as it is otherwise provided in these by-laws, each share of the capital stock of this company entitles the holder thereof to the use during the irrigating Season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this company, including the right to lease, pledge, sell and dispose of such use."

That at the time of the adoption of the above by-law there was no other [6] by-law in existence that in any way modified or affected the force and effect of said by-law above set forth, and neither has there been any by-law adopted since that time by the defendant Teton Co-operative Reservoir Company that in any wise modified or changed said by-law, and that ever since the year 1918 said by-law has been, and now is, in full force and effect.

8.

That said defendant Teton Co-operative Reservoir Company, during all the times herein mentioned has been, and now is the owner of and entitled to the use and possession of, the following described lands and premises, located in the County of Teton, State of Montana, and more particularly described as follows, to-wit:

Parts of lots 3 and 4, Section 18, Township 25 North, Range 6 West.

East half of southeast quarter (E½SE¼) of Section 11, township 25 North, range 7 West.

Southwest quarter (SW¼), west half of southeast quarter (W½SE¼) of Section 12, township 25 north, range 7 west.

Northwest quarter of northeast quarter (NW¼NE¼); North half of north half of northwest quarter (N½N½NW¼) of Section 13, township 26 North, range 6 West.

Southwest quarter of northeast quarter (SW¼NE¼); Southeast quarter of northwest quarter (SE¼NW¼); North half of southwest quarter (N½SW¼) of Section 32, township 26 North, range 6 West, consisting of 577.80 acres more or less according to the Government Survey thereof.

Together with a reservoir site on file and of record in the United States Land Office, which site covers and includes, for reservoir purposes, not less than 3387.19 acres of land located in township 26

North, range 7 West; Township 25 North, Range 7 West; Township 26 North, range 6 West, and township 25 North, range 6 West, of the Montana Meridian, in Teton County, Montana, which reservoir site as originally surveyed had a capacity of 67,500 acre feet of water, but which was afterwards increased to approximately 110,000 acre feet by the raising of the dams and reservoirs hereinafter described, after the said Bynum Irrigation [7] District became the owner as herein set forth, of 804 shares of the capital stock of said Teton Co-operative Reservoir Company.

9.

That defendant Teton Co-operative Reservoir Company since May, 1906, the date of its incorporation, to July 23, 1927, has constructed on said lands, reservoir site, premises and property, certain dams, reservoirs, ditches, canals and other works for the sole purpose of storing and supplying water for irrigation and domestic purposes to its stockholders, which had theretofore been appropriated by it out of the waters of the Teton River, the Muddy Creek and other rivers and creeks in Teton County, Montana, and since said last mentioned date has delivered at its headgate to the defendant Bynum Irrigation District, out of its said reservoir system eight hundred four one-thousandths (804/1000) of the water so diverted and stored pursuant to the provisions of the By-law set forth in paragraph 7 herein, and has since the year 1925 to the filing of

this complaint taken, diverted and used for irrigation and domestic purposes said water aforesaid within the corporate boundaries of said defendant Bynum Irrigation District, consisting of approximately 47,200 acres of land in Teton County, and the balance of the water in said reservoir system has been apportioned according to said By-law A-1, and used on lands and premises within the State of Montana, belonging to the stockholders of the above named plaintiff, to the extent of 156 shares, and the balance of 40 shares to various individuals.

10.

That the authorized capital stock of said defendant Teton Co-operative Reservoir Company consists of 1000 shares of the par value of $150.00 each. That during the year 1925 the said Bynum Irrigation District became the owner of 804 shares of said capital stock, and ever since has been and now is the owner of the same, and has controlled and does now control the said Teton Co-operative Reservoir Company and the managements of its business and affairs, [8] thru its Board of Directors all of which, except one, are members of the Bynum Irrigation District, and are elected by and thru the Board of Directors and stockholders of said Irrigation District.

11.

That when said Bynum Irrigation District acquired said capital stock of said Teton Co-operative Reservoir Company, the said Bynum Irrigation

District was without water for the proper irrigation of the land controlled by it, and said Bynum Irrigation District purchased said 804 shares of said capital stock of the Teton Co-operative Reservoir Company by reason of the provision of the By-law set forth in paragraph 7 herein by which said shares each represented one-thousandth part in said Reservoir system, and for the sole and only purpose of providing the said Bynum Irrigation District with sufficient water to irrigate the lands within said district, and to do so it became necessary to provide funds to said Teton Co-operative Reservoir Company to-wit $122,034.62 for the purpose of enlarging by approximately 4250 acre feet, said reservoir, and repairing its system for acquiring and storing waters for irrigation purposes.

12.

That on or about the 27th day of October, 1930, said defendant Winston Bros. Company, a corporation, commenced an action in the District Court of the Ninth Judicial District of the State of Montana in and for the County of Teton, against the above named defendant, Teton Co-operative Reservoir Company, a corporation, for the purpose of recovering a judgment on a promissory note made and delivered by said defendant, Teton Co-operative Reservoir Company to said Winston Bros. Company, a corporation, on or about the 23rd day of July, 1927.

That the promissory note on which said action of Winston Bros., a corporation was based, and upon which said judgment was granted represented the balance of an indebtedness due from said Teton Co-operative Reservoir Company to said Winston Bros. Company, incurred for [9] certain construction work performed by said Winston Bros. Company on the said reservoir and the canals and ditches used in connection therewith by which the same were enlarged and repaired as herein set forth; that when the agreement for said construction work was made by and between said Winston Bros. Company and said Teton Co-operative Reservoir Company, and while said construction work was being done, the said Winston Bros., and its officers, knew that the by-laws of said Teton Co-operative Reservoir Company provided that each share of the capital stock of said company entitled the holder thereof, to the use, during the irrigating season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and systems of said reservoir company, including the right to lease, pledge, sell and dispose of such use, and when said contract was made, and while said construction work was being performed by said Winston Bros. Company, the said Winston Bros. Company and its officers, knew that all of said lands, reservoir sites, premises and property on which said reservoir was located, were necessary to hold the water necessary to irrigate the lands and premises of said Bynum Irrigation District and the

land of the stockholders of said plaintiff corporation and others; that said construction work was done and accomplished thru the ownership by said Irrigation District of 804 shares out of 1000 shares of said Reservoir Company, all of which was known to said Winston Bros. Company who then and there had full knowledge of the by-law mentioned and set forth in paragraph 7 hereof.

That after the commencement of said last mentioned action the said defendant, Bynum Irrigation District, a public corporation, intervened in said action and thereafter and on or about the 6th day of December, 1935, a judgment was duly given, made and entered in said last mentioned action by the above entitled court, in favor of Winston Bros. a corporation, plaintiff and against Teton Co-operative Company, a corporation, defendant, for $29,-596.53 with interest at 6% until paid, a copy of which judgment is hereto annexed, marked "Exhibit A" and hereby made a part hereof.

That ever since said judgment was given and made as aforesaid, and for a long time prior thereto, the said defendant Bynum Irrigation District was and now is bankrupt and hopelessly insolvent. [10]

That said judgment of said Winston Bros. herein set forth and described, resulted from a balance due on a promissory note of $18,851.96 with interest at 6%, dated July 23, 1927 to defendant Winston Bros., signed by the Teton Co-operative Reservoir Company after having paid in cash, all that was

due said Winston Bros., except said note on the contract for the enlargement and improvement of said reservoir, as called for by said contract amounting in all to $122,034.62.

13.

That said defendant, Winston Bros. Company a corporation, under and by virtue of said judgment, claims a lien against the lands, reservoir sites, reservoir and premises owned by said defendant, Teton Co-operative Reservoir Company, located in said County of Teton, and hereinbefore described and said defendant, Winston Bros. Company, a corporation, has threatened to, and will, unless restrained by an order of this Court, apply for and obtain a writ of execution from the Clerk of said District Court for the purpose of enforcing said judgment, and will cause said lands, reservoir site, premises and property owned by said defendant, Teton Co-operative Reservoir Company, to be sold by the Sheriff of Teton County, Montana, under and by virtue of such writ of execution.

14.

That the plaintiff has agreed and is under legal obligation to supply its stockholders the proportionate share as hereinabove set forth, of the waters of said reservoir to which said stockholders are entitled by reason of the ownership of capital stock of said Reservoir Company by said plaintiff corporation as is hereinabove set forth, but if said defend-

ant, Winston Bros. Company, a corporation, causes said lands, reservoir, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company to be sold under and by virtue of the writ of execution obtained in said action wherein said judgment was rendered against said Teton Co-operative Reservoir Company, then and in that event the plaintiff will be deprived of its ability to [11] deliver water for irrigation and domestic purposes to its stockholders and thereby be compelled to breach its agreement with and obligation to such stockholders to the irreparable damage of the plaintiff and its stockholders.

15.

That said judgment is in truth and in fact not a lien against said lands, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company, and said lands are not subject to a sale under any writ of execution which may be obtained to enforce said judgment obtained by said Winston Bros. Company against said Teton Co-operative Reservoir Company for the reason that all of said lands, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company are necessary and are being used for the purpose of conveying and storing waters for irrigation purposes for the irrigation of the lands within said Bynum Irrigation District and the lands belonging to the stockholders of the plaintiff

herein and other stockholders of said Teton Co-operative Reservoir Company, and said land, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company are appurtenant to the lands of the stockholders of the plaintiff and said Bynum Irrigation District, a public corporation, and others owning the balance of its capital stock.

16.

That unless it be adjudged and decree by this Court that said judgment is not a lien against the said lands, reservoir site, premises and property of said Teton Co-operative Reservoir Company, and that said lands, reservoir site, premises and property can not be sold under and by virtue of a writ of execution issued upon said judgment, the said judgment will be and remain a cloud upon the title of said lands and premises of said Teton Co-operative Reservoir Company and the stockholders of said Bynum Irrigation District and of this plaintiff, and will cause serious and irreparable damage and injury to the plaintiff, its stockholders and the said Bynum [12] Irrigation District and its stockholders, and to the other stockholders of defendant, Teton Co-operative Reservoir Company.

17.

That a reservoir has been constructed on the said lands and premises of said Teton Co-operative Reservoir Company for the purpose of storing water

for irrigation purposes to be used on the lands and premises owned and controlled by its stockholders, located within said Bynum Irrigation District and the lands and premises belonging to the stockholders of said plaintiff and its other stockholders, which said reservoir contains not less than 3965 acres in area, and all of said land, premises, property, reservoir site and appurtenances are necessary to be occupied by said reservoir, canals, ditches, headgates, and other improvements which are necessary for the conveyances, storage and distribution of said irrigation water to and from said reservoir.

18.

That during all the times herein mentioned said Reservoir has been each year and now is to be used for irrigation purposes as aforesaid, with a capacity of approximately 110,000 acre feet of water for irrigation.

19.

That 500 shares of the capital stock of said plaintiff corporation have been issued and now held by owners of approximately 10,000 acres of land in Pondera County, Montana, which is being irrigated with the waters from said reservoir on the lands and premises herein described.

20.

That all of the water stored in said reservoir is necessary for the proper irrigation of the lands

and premises which have been and now are being irrigated by said Bynum Irrigation District of the lands and premises belonging to the stockholders of the said Plaintiff, and the other stockholders of said Teton Co- [13] operative Reservoir Company.

Wherefore, Plaintiff prays judgment as follows:

That a temporary restraining order may be issued against said defendant, Winston Bros. Company, a corporation, its officers and agents, restraining them from causing said lands, reservoir site, premises and property belonging to said Teton Co-operative Reservoir Company from being sold under and by virtue of any writ of execution, which may be obtained under and by virtue of said judgment against the Teton Co-operative Reservoir Company, pending the hearing on a prayer for a permanent injunction herein and that said Winston Bros. Company be permanently enjoined from claiming any lien against said lands, reservoir site, premises and property of said Teton Co-operative Reservoir Company under and by virtue of said judgment and be permanently enjoined from causing any of said lands, reservoir site, premises and property of said Teton Co-operative Reservoir Company from being sold under and by virtue of any writ of execution which may be issued pursuant to said judgment;

That this court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare the said judgment ob-

tained by said Winston Bros. Company against said Teton Co-operative Reservoir Company is not a lien against said lands and premises owned by said Teton Co-operative Reservoir Company and that said lands, reservoir site, premises and property can not be sold under and by virtue of any writ of execution which may be issued pursuant to said judgment;

That the Court pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare that the said lands, water rights, canals, ditches, dams, reservoirs and reservoir sites and other improvements on said lands, reservoir sites, premises and property of said defendant, Teton Co-operative Reservoir Company used solely for the purpose of providing, storing and conveying water for irrigation and domestic purposes to the stockholders of [14] said Bynum Irrigation District, a public corporation, and the stockholders of the plaintiff herein, are appurtenant to the lands belonging to said stockholders of said Bynum Irrigation District and the plaintiff herein, and all other stockholders of the Teton Co-operative Reservoir Company.

That the Court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare that the Brady Irrigation Company and its stockholders, their successors and assigns, have the right and authority to take at the headgate of the reservoir aforesaid of said Teton Co-operative Reservoir Company, 156-1000

part of all waters of said reservoir for the use and benefit of said stockholders, their successors and assigns, free and clear from any lien of the said judgment of said Winston Bros.

For the plaintiff's costs and disbursements herein incurred and expended and for such other and further relief as may be equitable, proper and just.

I. W. CHURCH
ART JARDINE
J. W. FREEMAN
J. N. THELEN
J. P. FREEMAN
ERNEST ABEL
Attorneys for Plaintiff [15]

State of Montana,
County of Cascade—ss.

J. W. Freeman, being first duly sworn, on oath deposes and says:

That he is the Secretary of the Brady Irrigation Company, a corporation, the above named plaintiff, and as such makes this verification for and on behalf of said plaintiff corporation.

That he has read the foregoing complaint and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

J. W. FREEMAN

Subscribed and sworn to before me this 6th day of July, A.D. 1937.

EILEEN L. ARMS
Notary Public for the State of Montana. Residing at Great Falls, Montana. My commission expires March 28, 1940.

(Seal) [16]

EXHIBIT A.

In the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Teton.

WINSTON BROS. COMPANY, a corporation,
Plaintiff,

vs.

TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation,
Defendant,

and

BYNUM IRRIGATION DISTRICT, a public corporation,
Intervenor.

JUDGMENT.

This cause came on regularly for trial upon the 6th day of December, 1935, at ten o'clock A.M.

before the Honorable R. M. Hattersley, Judge of the above court without a jury, by agreement of counsel regularly filed herein, upon the complaint and the answer thereto of the defendant, Teton Co-operative Reservoir Company, a corporation, the default of the defendant as to that portion of said answer designated "further Answer to Plaintiff's complaint, and by way of defense thereto," commencing with paragraph one on page 2 of said answer, having been regularly entered by the Clerk of this Court, and the default of Bynum Irrigation District, a public corporation, Intervenor, having been regularly entered by the Clerk of this Court; the plaintiff being represented by its attorneys, Messrs. Cooper, Stephenson & Hoover, the defendant not appearing in Court. Whereupon the plaintiff having announced itself ready for trial and no person appearing for either the defendant or the intervenor, [17] oral testimony and documentary evidence was submitted by plaintiff in support of the allegations of the complaint. No evidence was submitted in support of the answer and the case was closed and argued to the court by counsel, and the court being satisfied from the evidence that all of the allegations contained in the complaint are true,

Now therefore, by virtue of the law and the premises,

It is hereby ordered, adjudged and decreed that plaintiff, Winston Bros. Company, a corporation,

do have and recover of and from the said defendant, Teton Co-operative Reservoir Company, a corporation, the sum of Twenty-eight thousand five hundred seventy-seven and 28/100 dollars ($28,577.28) principal and interest upon the promissory note referred to in the complaint; the further sum of One thousand dollars ($1000.00) hereby fixed and allowed by the plaintiff as a reasonable attorneys' fee; and the further sum of Nineteen and 25/100 dollars ($19.25) plaintiff's costs and disbursements in this action, or a total sum of twenty-nine thousand, five hundred ninety-six and 53/100 dollars ($29,596.53) together with interest thereon at the rate of six per cent (6%) per annum from the date hereof until paid.

And it is further ordered, adjudged and decreed that plaintiff have execution against the property of the defendant in the manner prescribed by law.

Given and made this 6th day of December, 1935.

R. M. HATTERSLEY,

Judge.

[Endorsed]: Filed July 21, 1937, C. R. Garlow, Clerk, by C. G. Kegel, Deputy. [18]

Thereafter, on September 8, 1937, a Motion to Dismiss was duly filed herein by Winston Bros. Company, a corporation, defendant herein, being in the words and figures following, towit: [19]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Winston Bros. Company, a corporation, and files this Motion and hereby moves the court to dismiss the above-entitled action as to this defendant, and to dismiss plaintiff's bill of complaint on file in said action as to this defendant upon the ground and for the reason that said bill of complaint does not state facts sufficient to constitute a cause of action against this defendant or to entitle plaintiff to the relief sought, or any relief, against this defendant.

Wherefore, defendant prays that said action and said bill of complaint and said suit in equity be dismissed as to this defendant and that this defendant have and recover against plaintiff for its costs incurred herein.

Dated this 8th day of September, 1937.

R. H. GLOVER
S. B. CHASE, JR.
JOHN D. STEPHENSON,
Solicitors for defendant,
Winston Bros. Company,
410-First National Bank
Building, Great Falls,
Montana.

[Endorsed]: Filed Sept. 8, 1937. C. R. Garlow, Clerk, by C. G. Kegel, Deputy. [20]

STATEMENT AND CONSENT UNDER RULE 34:

The undersigned, solicitors, hereby pursuant to Rule 34 of the Rules of this Court designate the office of Cooper, Stephenson & Glover, 410-First National Bank Building, Great Falls, Montana, as the place within the District where service of all subsequent papers, except Writs and Process, may be made, and hereby consent that service of such papers may be made at such place upon said solicitors.

R. H. GLOVER
S. B. CHASE, JR.
JOHN D. STEPHENSON,
Solicitors for Winston Bros. Company.

Service admitted and receipt of a copy of Motion to Dismiss in the above-entitled action acknowledged, this 8th day of September, 1937.

FREEMAN, THELEN & FREEMAN
CHURCH & JARDINE
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 8, 1937. C. R. Garlow, Clerk, by C. G. Kegel, Deputy. [21]

Thereafter, on December 3, 1937, a Complaint in Intervention was duly filed herein by C. K. Malone, Intervener, being in the words and figures following, towit: [22]

[Title of District Court.]

BRADY IRRIGATION COMPANY,
a corporation,

Plaintiff.

vs.

WINSTON BROS. COMPANY, a corporation; TETON COOPERATIVE RESERVOIR COMPANY, a corporation; and BYNUM IRRIGATION DISTRICT, a public corporation,

Defendants.

C. K. MALONE, Intervenor.

COMPLAINT IN INTERVENTION.

Comes now the above named Intervenor, C. K. Malone, and for his complaint in Intervention herein complains and alleges:

I.

That during all the times herein mentioned, the above named defendant, Bynum Irrigation District, was and now is, a public corporation of the State of Montana, organized, existing and operating as an irrigation district under and by virtue of Chapter 146 of the Laws of 1909 of said State

and Acts amendatory thereof and supplemental thereto with its principal place of business at Bynum, Montana.

II.

That during all the times herein mentioned the above named defendant, Teton Cooperative Reservoir Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Montana, and is a citizen and resident of said State of Montana, with its principal place of business at Bynum, Montana, with a capital stock of one thousand (1000) shares of the par value of One Hundred Fifty ($150.00) Dollars each, all of which is now and was at all times herein mentioned issued and outstanding. [23] That said defendant, Teton Cooperative Reservoir Company, ever since its organization has been and now is operated solely and only for the purpose of maintaining a reservoir, ditches and canals and delivering water from the same for irrigation and domestic purposes to its stockholders; and said corporation has at no times nor now is, operated for profit; that the only income which said last mentioned corporation has ever received has been from the sale of its stock and from assessments levied against the outstanding capital stock of said corporation and the proceeds from the sale of its capital stock and such assessments have been used solely and only for the purpose of constructing, maintaining and repairing the reservoir hereinafter

described, and the canals and ditches conveying water to said reservoir.

III.

That during the year 1918, a by-law was adopted with the written consent of all the holders of the outstanding capital stock of said Teton Cooperative Reservoir Company and filed in the office of the Secretary of said corporation and duly copied in the book of by-laws of said corporation, providing among other things, as follows, to-wit:

> "A-1. Except as it is otherwise provided in these by-laws, each share of the capital stock of this company entitles the holder thereof to the use during the irrigating season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this company, including the right to lease, pledge, sell and dispose of such use."

That said by-law has at no time since its adoption been modified, repealed or changed and at the time of its adoption the same was not modified or affected by any by-law of said corporation then in effect.

IV.

That said defendant, Teton Co-operative Reservoir Company, during all the times herein mentioned has been, and now is the owner of and entitled to the use and possession of, the following described lands and premises, located in the County

of Teton, State [24] of Montana, and more particularly described as follows, to-wit:

Parts of lots 3 and 4, Section 18, Township 25 North, Range 6 West.

East half of southeast quarter (E½SW¼) of Section 11, township 25 north, Range 7 West.

Southwest quarter (SW¼), west half of southeast quarter (W½SE¼) of Section 12, township 25 north, Range 7 west.

Northwest quarter of northeast quarter (NW¼NE¼); North half of north half of northwest quarter (N½N½NW¼) of Section 13, township 26 North, Range 6 West.

Southwest quarter of northeast quarter (SW¼NE¼); Southeast quarter of northwest quarter (SE¼NW¼); North half of southwest quarter (N½SW¼) of Section 32, township 26 North, range 6 West, consisting of 577.80 acres more or less according to the Government Survey thereof.

Together with a reservoir site on file and of record in the United States Land Office, which site covers and includes, for reservoir purposes, not less than 3387.19 acres of land located in township 26 North, range 7 West; Township 25 North, Range 7 West; Township 26 North, Range 6 West, and township 25 North, range 6 West, of the Montana Meridian, in Teton County, Montana, which reservoir site as originally surveyed had a capacity of 67,500 acre foot of water, but which was afterwards

increased to approximately 110,000 acre feet by the raising of the dams and reservoirs hereinafter described, after the said Bynum Irrigation District became the owner as herein set forth, of 804 shares of the capital stock of said Teton Cooperative Reservoir Company.

V.

That defendant, Teton Cooperative Reservoir Company since May, 1906, the date of its incorporation, to July 23, 1927, has constructed on said lands, reservoir site, premises and property, certain dams, reservoirs, ditches, canals and other works for the sole purpose of storing and supplying water for irrigation and domestic purposes to its stockholders, which had theretofore been appropriated by it out of the waters of the Teton River, the Muddy Creek and other rivers and creeks in Teton County, Montana, and [25] since said last mentioned date has delivered at its headgate to the defendant Bynum Irrigation District, out of its said reservoir system eight hundred four one-thousandths (804/1000) of the water so diverted and stored pursuant to the provisions of the by-laws set forth in paragraph 3 herein, and has since the year 1925 to the filing of this complaint taken, diverted and used for irrigation and domestic purposes said water aforesaid within the corporate boundaries of said defendant Bynum Irrigation District, consisting of approximately 47,200 acres of land in Teton County, and the balance of the

water in said reservoir system has been apportioned according to said by-law A-1, and used on lands and premises within the State of Montana, belonging to the stockholders of the above named plaintiff, to the extent of 156 shares, and the balance of 40 shares to various individuals.

VI.

That the authorized capital stock of said defendant Teton-Cooperative Reservoir Company consists of 1000 shares of the par value of $150.00 each. That during the year 1925 the said Bynum Irrigation District became the owner of 804 shares of said capital stock, and ever since has been and now is the owner of the same, and has controlled and does now control the said Teton Cooperative Reservoir Company and the management of its business and affairs, thru its Board of Directors all of which, except one, are members of the Bynum Irrigation District, and are elected by and thru the Board of Directors and stockholders of said Irrigation District.

VII.

That when said Bynum Irrigation District acquired said capital stock of said Teton Cooperative Reservoir Company, the said Bynum Irrigation District was without water for the proper irrigation of the land controlled by it, and said Bynum Irrigation District purchased said 804 shares of said capital stock of the Teton Cooperative Reser-

voir Company by reason of the provision of the By-Laws set forth in paragraph 3 herein by which said shares each represented one- [26] thousandth part in said Reservoir system, and for the sole and only purpose of providing the said Bynum Irrigation District with sufficient water to irrigate the lands within said district, and to do so it became necessary to provide funds, to said Teton Cooperative Reservoir Company, to-wit $122,034.62 for the purpose of enlarging by approximately 47,200 acre foot, said reservoir, and repairing its system for acquiring and storing waters for irrigation purposes.

VIII.

That on or about the 27th day of October, 1930, said defendant Winston Bros. Company, a corporation, commenced an action in the District Court of the Ninth Judicial District of the State of Montana in and for the County of Teton, against the above named defendant, Teton Cooperative Reservoir Company, a corporation, for the purpose of recovering a judgment on a promissory note made and delivered by said defendant, Teton Cooperative Reservoir Company to said Winston Bros. Company, a corporation, on or about the 23rd day of July, 1927.

That the promissory note on which said action of Winston Bros. Company, a corporation, was based, and upon which said judgment was granted represented the balance of an indebtedness due from

said Teton Cooperative Reservoir Company to said Winston Bros. Company, incurred for certain construction work performed by said Winston Bros. Company on the said reservoir and the canals and ditches used in connection therewith by which the same were enlarged and repaired as herein set forth, that when the agreement for said construction work was made by and between said Winston Bros. Company and said Teton Cooperative Reservoir Company, and while said construction work was being done, the said Winston Bros. Company, and its officers, knew that the by-laws of said Teton Cooperative Reservoir Company provided that each share of the capital stock of said company entitled the holder thereof, to the use, during the irrigating season of each year, of a one-thousandth part of the waters, water rights and irrigating facilities and system of said reservoir company, including the right [27] to lease, pledge, sell and dispose of such use, and when said contract was made, and while said construction work was being performed by said Winston Bros. Company, the said Winston Bros. Company and its officers, knew that all of said lands, reservoir sites, premises and property on which said reservoir was located, was necessary to hold the water necessary to irrigate the lands and premises of said Bynum Irrigation District and the land of the stockholders of said plaintiff corporation and others; that said construction work was done and accomplished thru the owner-

ship by said Irrigation District of 804 shares out of 1000 shares of said Reservoir Company, all of which was known to said Winston Bros. Company who then and there had full knowledge of the by-laws mentioned and set forth in paragraph 3 hereof.

That after the commencement of said last mentioned action the said defendant, Bynum Irrigation District, a public corporation, intervened in said action and thereafter and on or about the 6th day of December, 1935, a judgment was duly given, made and entered in said last mentioned action by the above entitled court, in favor of Winston Bros. Company, a corporation, plaintiff and against Teton Co-operative Company, a corporation, defendant for $29,596.55, with interest at 6% until paid, a copy of which judgment is hereto annexed, marked "Exhibit B" and hereby made a part hereof.

That ever since said judgment was given and made as aforesaid, and for a long time prior thereto, the said defendant Bynum Irrigation District was and now is bankrupt and hopelessly insolvent.

That said judgment of said Winston Bros. herein set forth and described, resulted from a balance due on a promissory note of $18,851.96 with interest at 6%, dated July 23, 1927, to defendant Winston Bros. Company, signed by the Teton Co-operative Reservoir Company after having paid in cash, all that was due said Winston Bros. Company except said note on the contract for the enlargement and improvement of said reservoir, as called for by said contract amounting in all to $122,034.62. [28]

IX.

That said defendant, Winston Bros. Company, a corporation, under and by virtue of said judgment, claims a lien against the lands, reservoir sites, reservoir and premises owned by said defendant, Teton Co-operative Reservoir Company, located in said County of Teton, and hereinbefore described and said defendant, Winston Bros. Company, a corporation, has threatened to, and will, unless restrained by an order of this Court, apply for and obtain a writ of execution from the Clerk of said District Court for the purpose of enforcing said judgment, and will cause said lands, reservoir site, premises and property owned by said defendant, Teton Co-operative Reservoir Company, to be sold by the Sheriff of Teton County, Montana, under and by virtue of such writ of execution.

X.

That said judgment is in truth and in fact not a lien against said lands, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company, and said lands are not subject to a sale under any writ of execution which may be obtained to enforce said judgment obtained by said Winston Bros. Company against said Teton Co-operative Reservoir Company for the reason that all of said lands, reservoir sites, premises and property owned by said Teton Co-operative Reservoir Company are necessary and are being used for the purpose of conveying and storing waters for irrigation

purposes for the irrigation of the lands within said Bynum Irrigation District and the lands belonging to the stockholders of the plaintiff herein and other stockholders of said Teton Co-operative Reservoir Company, and said land, reservoir site, premises and property owned by said Teton Co-operative Reservoir Company are appurtenant to the lands of the stockholders of the plaintiff and said Bynum Irrigation District, a public corporation, and others owning the balance of its capital stock.

XI.

That a reservoir has been constructed on the said lands [29] and premises of said Teton Co-operative Reservoir Company for the purpose of storing water for irrigation purposes to be used on the lands and premises owned and controlled by its stockholders, located within said Bynum Irrigation District and the lands and premises belonging to the stockholders of said plaintiff and its other stockholders, which said reservoir contains not less than 3965 acres in area, and all of said land, premises, property, reservoir site and appurtenances are neccessary to be occupied by said reservoir, canals, ditches, headgates and other improvements which are necessary for the conveyance, storage and distribution of said irrigation water to and from said reservoir.

XII.

That during all the times herein mentioned said Reservoir has been each year and now is used for

irrigation purposes as aforesaid, with a capacity of approximately 110,000 acre feet of water for irrigation.

XIII.

That all of the water stored in said reservoir is necessary for the proper irrigation of the lands and premises which have been and now are being irrigated in said Bynum Irrigation District of the lands and premises belonging to the stockholders of the said plaintiff, and the other stockholders of said Teton Co-operative Reservoir Company.

XIV.

That prior to the first day of July, 1925, a Board of Commissioners of said Bynum Irrigation District was duly elected and qualified pursuant to the Statutes of the State of Montana in such cases made and provided, and prior to said first day of July, 1925, more than 60% in number and acreage of holders of title or evidence of title to the lands included within said Bynum Irrigation District signed a petition whereby the District Court of the Nineteenth Judicial District (now Ninth Judicial District) of the State of Montana, in and [30] for the County of Teton, was petitioned for leave to authorize the issuance of bonds for the purpose of selling such bonds and with the proceeds of such sales to purchase said stock of said Teton Co-operative Reservoir Company, in order to obtain rights to the use of the water for irrigation purposes within said Bynum Irrigation District and for the

further purpose of constructing canals, headgates, ditches and other improvements used for the conveyance of water from the reservoir constructed and maintained by said Teton Co-operative Reservoir Company, and thereafter the Board of County Commissioners of said Bynum Irrigation District, by an appropriate order or resolution, authorized and directed the issuance of bonds of the said Bynum Irrigation District to the amount of one million dollars ($1,000,000.00) said bonds being numbered consecutively from one to one thousand, both inclusive, and all being of like tenor, date and effect, except as to the number and date of payment thereof.

XV.

That thereafter by an order duly given, made and entered by the said District Court of Teton County, Montana, the said proposal of said Bynum Irrigation District, pertaining to the issuance of such bonds and the said bonds were duly confirmed by said District Court.

That all of the said bonds of said Irrigation District were thereafter sold by said Bynum Irrigation District, and the proceeds of the sales of the same were used for the purpose of purchasing shares of the capital stock of said Teton Co-operative Reservoir Company in order to obtain the right to the use of water for irrigation purposes within said Bynum Irrigation District and for the further purpose of constructing canals, head gates, ditches and other improvements used for the con-

veyance of water from the reservoir constructed and maintained by said Teton Co-operative Reservoir Company.

XVI.

That prior to the commencement of the above entitled [31] action, your Intervenor, for a valuable consideration, became the owner of and ever since has been and now is the owner of ten (10) of said bonds, numbered respectively as follows: Seventeen (17) to Twenty-five (25) inclusively each being for the sum of One thousand dollars ($1,000.00) and the dates of payments of said bonds being respectively as follows: A. D. 1931 and bond No. 808 not yet due. That a copy of one of said bonds is hereto annexed, marked Exhibit A and hereby made a part of this complaint.

XVII.

That no part of the sums specified in said bonds, owned by your Intervenor, have been paid.

XVIII.

That Section 7213 of the Revised Codes of Montana 1935 is the same as Section 7213 of the Revised Codes of Montana, 1921, and the same was in full force and effect during all the times herein mentioned and provides as follows:

> "Lien of Bonds: All bonds issued hereunder, and all amounts to be paid to the United States under any contract between the district and the United States, accompanying which

bonds of the district have not been deposited with the United States as in Section 7174 provided, shall be a lien upon all the lands originally or at any time included in the district for the irrigation and benefit of which said irrigation district was organized, and said bonds were issued, and for the benefit of which such contract between the district and the United States was made, except upon such lands as may at any time be included in such district on account of the exchange or substitution of water under the provisions of Section 7206 of this act, if any there be; and all such lands shall be subject to a special tax or assessment for the payment of the interest on and principal of said bonds; and all amounts to be paid to the United States under any such contract between the district and the United States, and said special tax or assessment, shall constitute a first and prior lien on the land against which levied, to the same extent and with like force and effect as taxes levied for State and County Purposes."

That by reason of the ownership of the bonds herein set forth, this intervenor has a lien against all of the lands within said Bynum [32] Irrigation District, all of which were prior to the irrigation of the same, semi-arid lands, and would not profitably produce crops without irrigation.

XIX.

That ever since the construction of the reservoir herein mentioned by said Teton Cooperative Reservoir Company, the lands in said Bynum Irrigation District have been and now are irrigated with waters from said reservoir constructed and maintained by said Teton Cooperative Reservoir Company, which said waters are the only available means of irrigating said lands.

XX.

That if the lands owned by said Teton Cooperative Reservoir Company should be sold under and by virtue of any writ of execution, issued on said judgment of said Winston Bros. Company, then and in that event the said Bynum Irrigation District would be deprived of the right to the use of waters from said Irrigation system constructed and maintained by said Teton Cooperative Reservoir Company and your Intervenor would be deprived of part of his security in that the lands within the said Bynum Irrigation District, if not irrigated, would be worth a great deal less than if irrigated or if the right to the use of the water from said irrigation system existed.

XXI.

That unless it be adjudged and decreed by this court that said judgment owned by said Winston Bros. Company is not a lien against the said lands, Reservoir site and property of said Teton Cooper-

ative Reservoir Company, and that said lands, Reservoir site and property cannot be sold under and by virtue of a writ of execution, issued upon said judgment, the said judgment will be and remain a cloud upon title of the lands and said premises of said Teton Cooperative Reservoir Company, and the lands and premises within said Bynum Irrigation District, and will cause serious and irreparable damage and injury to this Intervenor. [33]

XXII.

That there were a total of One Thousand (1000) bonds issued by said Bynum Irrigation District similar to the Ten (10) bonds belonging to your Intervenor and all of said bonds under and by virtue of the Provisions contained in the same and the laws of the State of Montana in such cases made and provided, are a lien upon all of the land situated in said Bynum Irrigation District and therefore, this Intervenor has no adequate remedy at law for the purpose of individually enforcing the payment of the bonds owned by this Intervenor, in that he is prevented from instituting an action for the purpose of enforcing the payment of his said bonds for the reason that all of said bonds are a lien upon all of the lands situated in said Bynum Irrigation District and no individual holder of such bonds as this plaintiff has a lien which is separable from the lien of all of said bonds.

Wherefore, Plaintiff prays judgment as follows:

That a temporary restraining order may be issued against said defendant, Winston Bros. Com-

pany, a corporation, its officers and agents, restraining them from causing said lands, reservoir site, premises and property belonging to said Teton Cooperative Reservoir Company from being sold under and by virtue of any writ of execution, which may be obtained under and by virtue of said judgment against the Teton Cooperative Reservoir Company, pending the hearing on a prayer for a permanent injunction herein and that said Winston Bros. Company be permanently enjoined from claiming any lien against said lands, reservoir site, premises and property of said Teton Cooperative Reservoir Company under and by virtue of said judgment and be permanently enjoined from causing any of said lands, reservoir site, premises and property of said Teton Cooperative Reservoir Company from being sold under and by virtue of any writ of [34] execution which may be issued pursuant to said judgment;

That this court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare the said judgment obtained by said Winston Bros. Company against said Teton Cooperative Reservoir Company is not a lien against said lands and premises owned by said Teton Cooperative Reservoir Company and that said lands, reservoir site, premises and property cannot be sold under and by virtue of any writ of execution which may be issued pursuant to said judgment;

That the Court pursuant to the power conferred under the Declaratory Judgment Act of the United

States of America, declare that the said lands, water rights, canals, ditches, dams, reservoir sites, premises and property of said defendant, Teton Cooperative Reservoir Company are used solely for the purpose of providing, storing and conveying water for irrigation and domestic purposes to the stockholders of said Bynum Irrigation District, a public corporation, and the stockholders of the Plaintiff herein, and are appurtenant to the lands belonging to said stockholders of said Bynum Irrition District and the plaintiff herein, and all other stockholders of the Teton Cooperative Reservoir Company.

That the Court, pursuant to the power conferred under the Declaratory Judgment Act of the United States of America, declare that the Stockholders of said Teton Cooperative Reservoir Company, their successors and assigns, have the right and authority to take at the headgate of the reservoir aforesaid of said Teton Cooperative Reservoir Company, all of the waters of said Reservoir for the use and benefit of said stockholders, their successors and assigns, free and clear from any lien of the said judgment of said Winston Bros. Company.

That the Court pursuant to the power conferred by virtue of Declaratory Judgment Act of the United States of America, declare that this Intervenor by reason of his ownership of said bonds has a [35] lien upon the right to the use of 804/1000 part of the waters diverted, stored and conveyed by means of the ditches, canals and reservoir on

the lands of said Teton Cooperative Reservoir Company.

For such other and further relief as may be equitable, proper and just.

GEO. COFFEY,

Atty. [36]

State of Montana
County of Teton—ss.

C. K. Malone, being first duly sworn, on oath deposes and says:

That he is the Intervenor named in the foregoing complaint;

That he has read said complaint and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to those therein stated upon information and belief, and as to them he believes the same to be true.

C. K. MALONE

Subscribed and sworn to before me this 30th day of September, A. D. 1937.

GEORGE COFFEY

Notary Public for the State of Mont. Residing at Choteau, Montana. My commission expires Dec. 28, 1939.

(Seal) [37]

EXHIBIT "A"

United States of America

Number 17 Dollars 1000

State of Montana
County of Teton.

BYNUM IRRIGATION DISTRICT
Six Per Cent Gold Bond
First Issue

For value received, Bynum Irrigation District, a public corporation of the State of Montana, promises to pay to the bearer, or if this bond is registered, then to the registered holder hereof, the sum of One Thousand Dollars in gold coin of the United States of America, of the present standard of weight and fineness, the first day of January, 1931, at the Office of the County Treasurer of Teton County, Choteau, Montana, or at the Hanover National Bank of New York City, at the option of the holder, together with the interest thereon from the date hereof at the rate of six per cent per annum, payable semi-annually, in like gold coin, on the first days of January and July of each year during the period of this bond, upon presentation and surrender of the respective coupons hereto attached as they severally become due and payable.

This bond is one of a series of 1,000 coupon bonds, numbered consecutively from 1 to 1000, both inclusive, all being of like tenor, date and effect, except as to the number and date of payment

thereof, and all issued under and pursuant to a resolution of the Commissioners of said Bynum Irrigation District, duly and regularly adopted on the twenty-sixth day of June, 1925, and confirmed by the District Court of the Nineteenth Judicial District of the State of Montana, in and for the County of Teton, as provided for by the laws of the State of Montana, and all being a lien upon all the land situated in said Bynum Irrigation District, as provided for by the laws of Montana.

This bond shall pass by delivery unless it has been registered on the books of the County Treasurer of Teton County, Montana, and may be so registered as to the principal thereof upon application to said Treasurer. Such registration of ownership shall be noted hereon and after such registration of this bond no transfer shall be valid unless it be made on the books of said Treasurer by the registered owner thereof in person, or by attorney duly authorized, and similarly noted hereon. This bond may, however, be discharged from the effect of such registration by being transferred on said books to the bearer and thereafter transferability by delivery shall be restored. It may, however, from time to time be again registered or again transferred to bearer as before. Such registration shall not, however, affect the negotiability of the coupons, which shall always be transferable by delivery merely.

This bond shall not become valid until authenticated by the signatures of the President and Secre-

tary of Bynum Irrigation District. The interest coupons attached to this bond may be authenticated by the engraved facsimile signatures of its President and Secretary. [38]

In witness whereof, said Bynum Irrigation District has caused this bond to be signed by the President and attested by the Secretary of its Board of Commissioners under its corporate seal, and in addition thereto has caused the interest coupons hereunto attached to be executed by the facsimile signatures of its President and Secretary, this first day of July, 1935.

W. D. JONES

President.

Attest:

E. B. NOBLE

Secretary.

(Corporate seal of Bynum Irrigation District)

[39]

(Back)

United States of America

State of Montana

County of Teton

BYNUM IRRIGATION DISTRICT

Six Per Cent Gold Bond

First Issue

$1000

Dated July 1, 1925—January 1, 1931.

Interest 6% Per Annum—Payable Semi-Annually on January 1 and July 1.

Both principal and Interest payable at the County Treasurer's Office, Choteau, Montana, or at The Hanover National Bank, New York, N. Y. At the option of the Holder.

ENDORSEMENTS:

State of Montana,
County of Teton.—ss.

We, the undersigned, do hereby severally certify that we have made and kept a record of the within bond in our respective offices pursuant to law.

E. B. NOBLE
Secretary Bynum Irrigation District.

OTTO WAYNILD
Treasurer Teton County, Montana.

Date, Name of Registered Owner, Signature.

Helena, Montana, July 1, 1925.

I, C. T. Stewart, Secretary of State of the State of Montana, do hereby certify that the within bond No. 17, of Issue No. One, of Bynum Irrigation District, issued July, 1925, is in accordance with an Act of the Legislature of Montana approved March 5, 1921, a legal investment for all trust funds and for the funds of all Insurance Companies, Banks, both Commercial and Savings, Trust Companies, state school funds, and any funds which may be

invested in county, municipal or school district bonds, and it may be deposited as security for the performance of any act whenever the bonds of any county, city, city and county, or school district may be so deposited, it being entitled to such privileges by virtue of an examination by the State Engineer, the Attorney General and State Examiner of the State of Montana, in pursuance of said Act. The within bond may also, according to the Constitution of the State of Montana, be used as security for the deposit of public money in banks in said State.

C. T. STEWART
Secretary of the State of the State of Montana.

(Great Seal of State)

State of Montana,
County of Teton—ss.

In the District Court of the Nineteenth Judicial District in and for the County of Teton

The issuance of this bond, and of the other bonds of the issue of which this bond is one, has been ratified, approved and confirmed by the decree of the said District Court.

Witness my hand and seal of said Court this 10th day of September, A. D. 1925.

[Court Seal] BLANCHE M. JACOBSON
Clerk of the District Court of Teton County, Mont.
By MEDA McLEAN

EXHIBIT "B"

In the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Teton.

WINSTON BROS. CO., a corporation,

Plaintiff.

vs.

BYNUM IRRIGATION DISTRICT, a public corporation,

Intervenor.

JUDGMENT

This cause came on regularly for trial upon the 6th day of December, 1935, at ten o'clock A.M. before the Honorable R. M. Hattersley, Judge of the above court without a jury, by agreement of counsel regularly filed herein, upon the complaint and the answer thereto of the defendant, Teton Co-Operative Reservoir Company, a corporation, the default of the defendant as to that portion of said answer designated "further Answer to Plaintiff's complaint, and by way of defense thereto," commencing with paragraph one on Page Two of said answer, having been regularly entered by the Clerk of this Court, and the default of Bynum Irrigation District, a public corporation, Intervenor, having been regularly entered by the Clerk of this Court; the plaintiff being represented by its attorneys, Messrs. Cooper Stephenson & Hoover, the defend-

ant not appearing in Court. Whereupon the plaintiff having announced itself ready for trial and no person appearing for either the defendant or the intervenor, oral testimony and documentary evidence was submitted by plaintiff in support of the allegations of the complaint. No evidence was submitted in support of the answer and the case was closed and argued to the court by counsel, and the court being satisfied from the evidence [41] that all of the allegations contained in the complaint are true,

Now therefore, by virtue of the law and the premises,

It is hereby ordered, adjudged and decreed that plaintiff, Winston Bros. Company, a corporation, do have and recover of and from the said defendant, Teton Co-Operative Reservoir Company, a corporation, the sum of Twenty-eight thousand five Hundred Seventy-Seven and 28/100 dollars ($28,-577.28) principal and interest upon the promissory note referred to in the complaint; the further sum of One Thousand Dollars ($1000.00) hereby fixed and allowed by the plaintiff as a reasonable attorneys' fee; and the further sum of Nineteen and 25/100 dollars ($19.25) plaintiff's costs and disbursements in this action, or a total sum of Twenty-Nine Thousand, Five Hundred Ninety-six and 53/100 Dollars ($29,596.53) together with interest

thereon at the rate of six per cent (6%) per annum from the date hereof until paid.

And it is further ordered, adjudged and decreed that plaintiff have execution against the property of the defendant in the manner prescribed by law.

Given and made this 6th day of December, 1935.

R. M. HATTERSLEY,
Judge.

Service of the within complaint and receipt of copy are hereby acknowledged this 5th day of October, 1937.

FREEMAN, THELEN & FREEMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 23, 1937, C. R. Garlow, Clerk. [42]

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT IN INTERVENTION

Comes now the defendant, Winston Bros. Company, a corporation and files its motion and moves the court to dismiss the complaint in intervention on file in said action as to this defendant, and to dismiss the cause of action sought to be alleged against this defendant in said complaint in intervention on the ground and for the reason that said

complaint in intervention does not state facts sufficient to constitute a cause of action against this defendant or to entitle the intervenor to the relief sought, or any relief, against this defendant.

Wherefore, defendant prays that said complaint in intervention be dismissed as to this defendant and that this defendant have and recover against the intervenor for its costs incurred herein.

Dated Dec. 2, 1937.

R. H. GLOVER
S. B. CHASE, JR.
JOHN D. STEPHENSON
Solicitors for the defendant,
Winston Bros. Company.
410-First National Bank
Bldg., Great Falls, Montana.

[Endorsed]: Filed Dec. 3, 1937, C. R. Garlow, Clerk. [43]

Thereafter, on March 11, 1938, an Order granting leave to James A. Ackroyd, et al, to Intervene herein, was duly filed herein, being in the words and figures following, towit: [44]

[Title of District Court.]

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS, and FRANK E. NELSON,

Intervenors,

vs.

BRADY IRRIGATION COMPANY, a corporation,

Plaintiff;

and

WINSTON BROTHERS COMPANY, a corporation, TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation, and BYNUM IRRIGATION DISTRICT, a public corporation,

Defendants;

and

C. K. MALONE,

Intervenor.

Respondents.

ORDER

This cause coming on to be heard this 11th day of March, 1938, on the petition of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson for leave to intervene and to be made parties thereto, and the petition having been duly considered, and it appearing to the court that the petitioners have an interest in the above entitled

action sufficient to warrant their becoming parties to the same, and it further appearing to the court that the parties to the said action or their counsel have consented to [45] the intervention prayed for;

It is, therefore, ordered, adjudged and decreed that James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, be, and they are hereby, granted leave to intervene in said action and to file a bill in intervention therein;

And it is further ordered, adjudged and decreed that any party to the said action may plead to the said bill in intervention at any time within ten days from and after service of a copy of this order.

Dated this 11th day of March, 1938.

CHARLES N. PRAY,
U. S. District Judge.

[Endorsed]: Filed March 11, 1938, C. R. Garlow, Clerk. [46]

Thereafter, on March 11, 1938, a Bill of Intervention was duly filed herein by James A. Ackroyd, et al, Interveners, being in the words and figures following, towit: [47]

[Title of District Court and Cause.]

BILL OF INTERVENTION

Come now the Intervenors, James A. Akroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson,

above named, by leave of court first had and obtained, and file this their bill of intervention against the above named Respondents, and complain and allege:

I.

That insofar as the same are not inconsistent with the allegations of the said Intervenors all of the allegations of the complaint herein are hereby referred to and made a part of this bill of intervention; [48]

II.

That at the time of the commencement of the above entitled action the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter and J. Edward Stevens, were, ever since have been and now are citizens and residents of the State of Massachusetts, and the Intervenor, Frank E. Nelson, was, ever since has been and now is a citizen and resident of the State of Illinois;

III.

That at all of the times mentioned in Plaintiff's complaint the said Plaintiff was, ever since has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Montana, and a citizen and resident of the State of Montana;

IV.

That ever since long prior to the institution of the above entitled action the Defendant, Winston

Brothers Company, has been and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Minnesota, and a citizen and resident of the State of Minnesota;

V.

That the above entitled action, as to the claims of both the Plaintiff and the said Intervenors, is one of a civil nature wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and is between citizens of different states;

VI.

That Bynum Irrigation District, named in Plaintiff's complaint, is a public corporation duly created, organized and now existing as such under the provisions of Chapter 146, Laws of Montana, 1909, and the acts amendatory thereof and supplemental thereto, and that ever since on or about the year 1925 the said Bynum Irrigation District has been engaged in business as an [49] irrigation district and, primarily, to provide the lands within the said district with water to irrigate the same;

VII.

That on or about the 1st day of July, 1925, the said Bynum Irrigation District duly issued, negotiated and sold its six per cent gold bonds, of the aggregate principal amount of $1,000,000, dated July 1st, 1925, and payable serially as follows, to-wit:

$15,000	January 1, 1930
$20,000	January 1, 1931
$20,000	January 1, 1932
$20,000	January 1, 1933
$20,000	January 1, 1934
$25,000	January 1, 1935
$25,000	January 1, 1936
$25,000	January 1, 1937
$25,000	January 1, 1938
$30,000	January 1, 1939
$30,000	January 1, 1940
$30,000	January 1, 1941
$35,000	January 1, 1942
$35,000	January 1, 1943
$40,000	January 1, 1944
$40,000	January 1, 1945
$45,000	January 1, 1946
$50,000	January 1, 1947
$50,000	January 1, 1948
$50,000	January 1, 1949
$50,000	January 1, 1950
$55,000	January 1, 1951
$60,000	January 1, 1952
$65,000	January 1, 1953
$70,000	January 1, 1954
$70,000	January 1, 1955

VIII.

That the said bonds were all of like date, tenor and effect, save only as to the numbers and date of payment thereof, and that a true and correct copy of one of the said bonds (exclusive of the interest coupons annexed to the same) is hereto attached, marked Exhibit "A" and hereof made a part;

IX.

That the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. [50] Nelson, are the owners and holders of 923 of said bonds, aggregating the total principal amount of $923,000, and that a list of the said bonds so owned and held by the said Intervenors is as follows, to-wit:

Bond Numbers	Maturity Date	Aggregate Principal Amount
1, 5 to 11, both incl. & 14 and 15	1/1/30	$ 10,000
16 & 26 to 35, both incl.	1/1/31	11,000
36 to 55, both incl.	1/1/32	20,000
56 to 75, both incl.	1/1/33	20,000
76 to 95, both incl.	1/1/34	20,000
96 to 107, both incl. & 113 to 120, incl.	1/1/35	20,000
121 to 145, both incl.	1/1/36	25,000
146 to 170, both incl.	1/1/37	25,000
171 to 195, both incl.	1/1/38	25,000
196 to 225, both incl.	1/1/39	30,000
228 to 255, both incl.	1/1/40	28,000
256 to 268, both incl. & 271 to 284, both incl.	1/1/41	27,000
286 to 320, both incl.	1/1/42	35,000
321 to 355, both incl.	1/1/43	35,000

Bond Numbers	Maturity Date	Aggregate Principal Amount
356, 357, 358, 360 to 391, both incl. and 393, 394 and 395	1/1/44	38,000
396 to 413, both incl. & 419 to 435, both incl.	1/1/45	35,000
436 to 480, both incl.	1/1/46	45,000
481 to 490, both incl. 492, 493, 496, 498, 499, 501 to 512, both incl., 514 to 520 both incl. & 520 to 530, both incl.	1/1/47	43,000
531 to 535, both incl. & 542 to 580, both incl.	1/1/48	44,000
581 to 630, both incl.	1/1/49	50,000
632, 633, 636 to 649, both incl. 651 to 671, both incl. & 673 to 680, both incl.	1/1/50	45,000
681 to 735, both incl.	1/1/51	55,000
736 to 782, both incl. 784 to 795, both incl.	1/1/52	59,000
796 to 805, both incl., 807, 809, and 811 to 860, both incl.	1/1/53	62,000
861 to 890, both incl. 895 to 930, both incl.	1/1/54	66,000
941 to 951, both incl. & 962 to 1,000, both incl.	1/1/55	50,000
	Total	$923,000

[51]

X.

That none of the bonds so listed as above and owned and held by the said Intervenors has been paid;

XI.

That ever since on or about the year 1906 Teton Co-Operative Reservoir Company, named in Plaintiff's complaint, has been, and now is, a corporation,

duly created, organized and existing under and by virtue of the Laws of the State of Montana; that the said Company was organized primarily to make water appropriations under the laws of the State of Montana and to distribute water for the irrigation of lands within the said state; that the said Company has made appropriations of water and has constructed a reservoir into which the said waters have been diverted and there impounded and that the waters so appropriated, diverted and impounded have been distributed by the said Company to large tracts of land that have been irrigated by the same; that in the conduct of its business the said Company has acquired and now owns and holds real estate in Teton County, Montana; that it has constructed improvements thereon consisting of the said reservoir, embankments for the same, dams, headgates, canals, and other necessary structures for the proper diversion, impounding and distribution of waters for irrigation purposes, and that all of the said real estate is needed by the said Company for the conduct of its business.

XII.

That the said Teton Co-Operative Reservoir Company has engaged in no other business than the appropriation, diversion, impounding and distribution of water for the irrigation of lands, and that such business has been conducted at all times without profit to the said Company or its stockholders; that water has been so distributed by the said Com-

pany at the actual cost of the service and for the use of its stockholders and no other persons whomsoever; that each share of the capital stock of the said Company represents the right of the owner and holder thereof to an [52] undivided one-thousandths part of the water appropriated, impounded and distributed by the said Company; that at all times since the organization of the said Company the said capital stock has evidenced the ownership of a right to water for the irrigation of land and to the extent hereinbefore set forth; and that the said Company has been operated at all times since its organization only as an instrumentality or agency of its stockholders for the appropriation, impounding and distribution of water for the irrigation of lands;

XIII.

That Bynum Irrigation District was organized for the purpose of irrigating large tracts of land in Teton County, Montana, and that on or about the year 1925 the said Bynum Irrigation District, being wholly without water for the irrigation of such land, made and entered into an agreement to purchase, for a consideration of $500,000.00 payable from the proceeds of the $1,000,000.00 bond issue above mentioned, eight hundred four shares of the capital stock of the said Teton Co-Operative Reservoir Company, being 80.4% of the issued and outstanding capital stock of the said Company, to the end that thereby the said Bynum Irrigation District might acquire an adequate supply of water for the

irrigation of the lands within the said District; that on or about the year 1925 one W. A. Thaanum, an owner of land in the said District, instituted a certain action to restrain the said District and its Board of Commissioners from expending any money belonging to the said District for the purchase of the said eight hundred four shares of capital stock above mentioned, and that thereafter in the said action, and on or about the year 1925, the Supreme Court of the State of Montana duly adjudged that the said District and its said Board of Commissioners, by virtue of the provisions of Subdivision 3, Section 7174, Revised Codes of Montana, 1921, as amended by Chapter 157, Laws of Montana, 1923, had the power and authority to purchase the said eight hundred four shares of capital [53] stock of Teton Co-Operative Reservoir Co., and that the judgment rendered is in full force, virtue and effect; that thereafter and on or about the 15th day of September, 1925, the said Bynum Irrigation District duly purchased the said eight hundred four shares of the capital stock of the said Teton Co-Operative Reservoir Co. and the water rights evidenced thereby, and ever since the purchase thereof has owned and held the same; that the said capital stock of the said Teton Co-Operative Reservoir Co. so purchased, as aforesaid, constitutes and is the sole source of water supply for the said Bynum Irrigation District and is indispensable, in its entirety, to the conduct of the business of the said Bynum Irrigation District as a

public corporation of the State of Montana; that upon the purchase of the said shares of capital stock of Teton Co-Operative Reservoir Company the said Bynum Irrigation District and its Board of Commissioners duly apportioned water for irrigation among the lands in the district, as required by law, and in a just and equitable manner, being the water acquired by the purchase of the said stock, and that such water thereupon became, ever since has been and now is appurtenant to such lands and inseparable from the same;

XIV.

That Subdivision 3, Section 7174, Revised Codes of Montana, 1921, as amended by Chapter 157, Laws of Montana, 1923, enumerates certain powers of the Board of Commissioners of Bynum Irrigation District and that the said section, as so amended, is in the words as follows, to-wit:

> "The board shall have power and authority to appropriate water in the name of the district, to acquire by purchase, lease, or contract, water and water rights; additional waters and supplies of water, canals, reservoirs, dams and other works already constructed, or in the course of construction, with the privilege, if desired, to contract with the owner, or owners of such canals, reservoirs, dams and other works so purchased and in the course of construction,

for the completion thereof and shall also have power and authority to acquire by purchase, lease, contract, condemnation, or other legal means, lands (and rights [54] in lands) for rights of way, for reservoirs, for the storage of needful waters, and for dam sites, and necessary appurtenances, and such other lands and property as may be necessary for the construction, use, maintenance, repair, improvement, enlargement and operation of any district system of irrigation works."

XV.

That ever since on or about the year 1925 the said Bynum Irrigation District, as the owner of the aforesaid eight hundred four shares of capital stock, and through its Board of Commissioners, has controlled the said Teton Co-Operative Reservoir Company and its business and affairs, and has operated the said Company for the use and benefit of the said Bynum Irrigation District and the other stockholders of the said Company;

XVI.

That the lands within Bynum Irrigation District would be arid and dry and of negligible value for agricultural purposes without the water rights acquired by the purchase of the aforesaid capital stock of Teton Co-Operative Reservoir Company and that the value of the said lands without the said water rights would be wholly insufficient to enable the said

Bynum Irrigation District by the assessment of the same to pay the aforesaid bonds or any substantial portion thereof;

XVII.

That on or about the year 1927 the Defendant, Winston Brothers Company, a corporation, acquired from Teton Co-Operative Reservoir Company the latter's promissory note, for a considerable sum of money, representing an indebtedness incurred by the said Teton Co-Operative Reservoir Company in and about the conduct of its corporate business and affairs, and that at the time the said indebtedness was incurred and when the said promissory note was executed and delivered the said Defendant, Winston Brothers Company, then and there well knew that the said Teton Co-Operative Reservoir Company was the instrumentality and agency through and by which the [55] Bynum Irrigation District supplied water for irrigation purposes to the lands in the said district and that the said district had no other means of supplying water to the same; and that the said Winston Brothers Company also then and there knew each and all of the other facts and circumstances hereinbefore set forth and alleged herein;

XVIII.

That thereafter, as more particularly alleged in Plaintiff's complaint herein, the said Winston Brothers Company brought an action upon the

aforesaid promissory note and recovered therein a judgment against the said Teton Co-Operative Reservoir Company, a copy of which said judgment is annexed to the said Plaintiff's complaint and is by reference made a part hereof; that the said judgment has been docketed in the office of the Clerk of the District Court of the Ninth Judicial District of the State of Montana in and for the County of Teton, and that by virtue of the said judgment and of the docketing thereof the said Defendant, Winston Brothers Company, claims a lien upon the real estate of the Teton Co-Operative Reservoir Company necessarily used as aforesaid for the impounding and distribution of waters and for the irrigation of the lands in the said Bynum Irrigation District, and that the said Winston Brothers Company further claims the right, under the said judgment, to levy upon the said real estate by writ of execution and to cause the same to be sold at sheriff's sale and to deprive the said Teton Co-Operative Reservoir Company and the said Bynum Irrigation District of the said property, all of which said property is indispensable, as hereinbefore alleged, to the operation of the said Bynum Irrigation District as a public corporation and to the delivery of waters for irrigation purposes to the lands in the said district;

XIX.

That the aforesaid claims of the said Defendant, Winston Brothers Company, are without right; that

a sale of the said real [56] estate under execution upon the aforesaid judgment would jeopardize and destroy the rights and liens of the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, under the aforesaid bonds, and that the said Winston Brothers Company is without right to cause the said real estate, or any part of the same, to be sold under the said judgment or under any writ or writs of execution issued thereon.

Wherefore, the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, pray:—

1. That this court declare by its judgment herein, pursuant to the Acts of Congress relating to declaratory judgments, that the said Winston Brothers Company is without right, under its judgment against the said Teton Co-Operative Reservoir Company, or under any writ or writs of execution issued thereon, to sell either at sheriff's sale or otherwise or at all any of the said real estate of the said Teton Co-Operative Reservoir Co., and that the said Winston Brothers Company has no lien under the said judgment upon the said real estate;

2. That they may have further relief based upon this Court's declaratory judgment herein whenever necessary or proper, and also such other and further relief as to the court shall seem meet, just and equitable.

And the said Intervenors further repeat and reallege the prayer for relief contained in the com-

plaint of Plaintiff filed in the above entitled action, with the same force and effect as if said prayer for relief were herein set forth at length, and further pray that they may have the benefit of any and all proceedings had [57] in the said above entitled action.

R. E. COOKE
FREDRIC MOULTON and
STERLING M. WOOD
By STERLING M. WOOD
Attorneys for James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, Intervenors. [58]

State of Montana,
County of Yellowstone—ss.

Sterling M. Wood, of lawful age, being first duly sworn, on his oath deposes and says:

That he is one of the attorneys for the Intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, in the above entitled action and makes this verification in their behalf; that he has read the above and foregoing Bill of Intervention and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

STERLING M. WOOD.

Subscribed and sworn to before me this 23rd day of February, 1938.

[Notarial Seal] HAZEL BRAINARD,
Notary Public for State of Montana, Residing at Billings, Montana. My commission expires April 16, 1939. [59]

EXHIBIT "A"

Number	Dollars
100	1000

United States of
America
State of Montana
County of Teton
BYNUM IRRIGATION DISTRICT
Six Per Cent Gold Bond
First Issue

For Value Received, Bynum Irrigation District, a public corporation of the State of Montana, promises to pay to the bearer, or if this bond is registered, then to the registered holder hereof, the sum of One Thousand Dollars in gold coin of the United States of America, of the present standard of weight and fineness, the First Day of January, 1935, at the Office of the County Treasurer of Teton County, Choteau, Montana, or at The Hanover National Bank of New York City, at the option of the holder, together with the interest thereon from the date hereof at the rate of Six Per Cent Per Annum, payable semi-annually, in like gold coin, on the First

Days of January and July of each year during the period of this bond, upon presentation and surrender of the respective coupons hereto attached as they severally become due and payable.

This Bond is one of a series of 1,000 coupon bonds, numbered consecutively from 1 to 1,000, both inclusive, all being of like tenor, date and effect, except as to the number and date of payment thereof, and all issued under and pursuant to a resolution of the Commissioners of said Bynum Irrigation District, duly and regularly adopted on the twenty-sixth day of June, 1925, and confirmed by the District Court of the Nineteenth Judicial District of the State of Montana, in and for the County of Teton, as provided for by the laws of the State of Montana, and all being a lien upon all the land situated in said Bynum Irrigation District, as provided for by the laws of Montana.

This Bond shall pass by delivery unless it has been registered on the books of the County Treasurer of Teton County, Montana, and may be so registered as to the principal thereof upon application to said Treasurer. Such registration of ownership shall be noted hereon and after such registration of this bond no transfer shall be valid unless it be made on the books of said Treasurer by the registered owner thereof in person, or by attorney duly authorized, and similarly noted hereon. This bond may, however, be discharged from the effect of such registration by being transferred on said books to

the bearer and thereafter transferability by delivery shall be restored. It may, however, from time to time be again transferred to bearer as before. Such registration shall not, however, affect the negotiability of the coupons, which shall always be transferable by delivery merely.

This Bond shall not become valid until authenticated by the signatures of the President and Secretary of Bynum Irrigation District. The interest coupons attached to this bond may be authenticated by the engraved facsimile signatures of its President and Secretary. [60]

In Witness Whereof, said Bynum Irrigation District has caused this bond to be signed by the President and attested by the Secretary of its Board of Commissioners under its corporate seal, and in addition thereto has caused the interest coupons hereunto attached to be executed by the facsimile signatures of its President and Secretary, this first day of July, 1925.

W. D. JONES,
President.

Attest:
E. B. NOBLE,
Secretary.

(Reverse Side of Bond)

ENDORSEMENTS.

State of Montana,
County of Teton—ss.

We, the undersigned, do hereby severally certify that we have made and kept a record of the within bond in our respective offices pursuant to law.

E. B. NOBLE,
Secretary Bynum Irrigation District

OTTO WAGNILD,
Treasurer Teton County, Montana.

Date	Name of Registered Owner	Signature
.....	.....	.....
.....	.....	.....
.....	.....	.....

Helena, Montana, July 1, 1925.

C. G. Stewart, Secretary of State of the State of Montana, do hereby certify that the within bond No. 100, of issue No. One, of Bynum Irrigation District, issued July 1, 1925, is in accordance with an Act of the Legislature of Montana approved March 5, 1921, a legal investment for all trust funds, and for the funds of all Insurance Companies, Banks, both commercial and savings, Trust Companies, state

school funds, and any funds which may be invested in county, municipal or school district bonds, and it may be deposited as security for the performance of any act whenever the bonds of any county, city, city and county, or school district may be so deposited, it being entitled to such privileges by virtue of an examination by the State Engineer, the Attorney General and State Examiner of the State of Montana, in pursuance of said Act. The within bond may [61] also, according to the Constitution of the State of Montana, be used as security for the deposit of public money in banks in said State.

C. G. STEWART,
Secretary of State of the State of Montana.

State of Montana,
County of Teton—ss.

In the District Court of the Nineteenth Judicial District in and for the County of Teton.

The issuance of this bond, and of the other bonds of the issue of which this bond is one, has been ratified, approved and confirmed by the decree of the said District Court.

Witness my hand and seal of said Court this 10th day of September, A. D. 1925.

[Seal] BLANCHE M. JACOBSON,
Clerk of the District Court of Teton County, Montana.
By MEDA McLEAN,
Deputy Clerk.

[Endorsed]: Filed Mar. 11th, 1938. C. R. Garlow, Clerk. [62]

Thereafter, on March 22, 1938, a Motion to Dismiss Bill of Intervention of James A. Ackroyd, et al., was duly filed herein, being in the words and figures following, towit: [63]

[Title of District Court and Cause.]

MOTION TO DISMISS BILL OF INTERVENTION OF JAMES A. ACKROYD, ET. AL.

Comes Now the defendant, Winston Brothers Company, a corporation, whose correct corporate name is Winston Bros. Company, a corporation, and files this motion and hereby moves the court to dismiss the above-entitled action as to this defendant and to dismiss the bill of intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, on file in this action, as to this defendant, upon the ground and for the reason that said Bill of Intervention does not state facts sufficient to constitute a cause of action against this defendant, or to entitle said intervenors to the relief sought, or [64] any relief, against this defendant.

Wherefore, defendant prays that said action and said Bill of Intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, and said suit in equity, be dismissed as to this defendant and that this defendant have and recover against the Intervenors above named for its costs incurred herein.

Dated this 22nd day of March, 1938.

R. H. GLOVER,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
Solicitors for Defendant,
Winston Brothers Company,
410-First National Bank
Bldg.,
Great Falls, Montana.

[Endorsed]: Filed March 22, 1938. C. R. Garlow, Clerk. [65]

Thereafter, on February 13, 1939, the Decision of the Court was duly filed herein, being in the words and figures following, towit: [66]

[Title of District Court and Cause.]

DECISION.

The complaint in above cause was filed therein pursuant to the Declaratory Judgment Act, 28 U. S. C. A. 400. In the beginning Brady Irrigation Company, a corporation, was plaintiff, and Winston Brothers Company, a corporation, Teton Co-Operative Reservoir Company, a corporation, and Bynum Irrigation District, a public corporation, were defendants. C. K. Malone alleges ownership of ten of the bonds of the Bynum Irrigation District in his complaint in intervention, and James A. Ackroyd and five other persons allege that they are the own-

ers and holders of nine hundred twenty-three of the bonds of Bynum Irrigation District in their complaint in intervention, and that there are in all 1000 bonds of the par value of one million dollars. Three motions by Winston Brothers Company are pending seeking the dismissal of the complaints of plaintiff and Malone, intervenor and the Bill of Ackroyd, et al, as to this defendant. The grounds alleged in all three motions are that the complaints fail to state facts sufficient to constitute a cause of action against the defendant, Winston Brothers Company. This matter comes before the court under Rule 40 (2) and briefs have been submitted on the motions by counsel for the respective parties, plaintiff, defendant and intervenors, Ackroyd, et al. [67]

According to the briefs the defendant seems to be satisfied, generally speaking, with plaintiff's statement of facts, which alleges, among other things, that plaintiff is a corporation organized and operating solely for the purpose of delivering water for irrigation and domestic purposes to its stockholders and has been operated only as a co-operative association and not for profit; that the defendant, Teton Co-operative Reservoir Company is a corporation and ever since its organization has been operated solely and only for the purpose of delivering water for irrigation and domestic purposes particularly for the irrigation of lands owned or controlled by the stockholders of the same, and that it has never operated for profit, and that the

only income it has ever received has been from sale of its capital stock and from assessments levied against the same; that it has a capital stock of one thousand shares of the par value of $150.00, 804 of which are owned by Bynum Irrigation District, a public corporation, and 156 shares owned by the plaintiff, and the other 40 shares by other stockholders. The Reservoir Company owns property consisting of about 577.81 acres of land situated in Teton County, Montana; that the land is necessary for use by the Reservoir Company for purposes of reservoir, dam and other irrigation works which are needed for diverting, conveying storing and distributing water to stockholders of the Reservoir Company to irrigate the lands of such stockholders, and the stockholders of plaintiff and members of the Bynum Irrigation District.

In 1930 defendant, Winston Brothers Company obtained a judgment in the state court of Teton County, Montana, against the Reservoir Company on a promissory note made by the Reservoir Company to this defendant, dated July 23, 1927, and that by reason of such judgment the defendant claims a lien against the property of the Reservoir Company and unless restrained by an order of this court will cause an execution to issue for the enforcement of the judgment by sale of the lands, reservoir site and other property of the Reservoir Company. The principal question therefore is, whether the defendant, Winston Brothers Company, has a lien upon the [68]

said property, and whether it is subject to sale under a writ of execution for the enforcement of the judgment. The theory of plaintiff is that the use of the water diverted, stored and distributed by the Reservoir Company and its irrigation works are appurtenant to the lands which are irrigated by such water, and that since all of the lands of the Reservoir Company are necessary for the diversion, storage and distribution of such waters that they can not be sold under execution.

The theory of the intervenors, Ackroyd, et al, is that the Reservoir Company is not operated for profit and has no beneficial interest in the real estate it owns; that the real estate, and the appurtenances, are used only to provide water for irrigation purposes to the stockholders of the company at the cost of the service, each share of stock representing the right to a proportionate part of the water rights involved; that the Bynum Irrigation District is a public corporation and is the owner of 80.4% of the stock of the Reservoir Company—thus controlling its business; that the Reservoir Company is but a trustee holding a naked legal title to the water facilities and the entire beneficial interest therein is vested in its stockholders, which include the Bynum Irrigation District holding 80.4% of the outstanding stock; therefore, the Bynum Irrigation District is a cestui que trust of the trust of which the Reservoir Company is trustee. That since the real estate of the Reservoir Company

belongs to the Bynum Irrigation District, a public corporation, for reasons of public policy it would be exempt from execution. The title to 577.81 acres of land is in the Reservoir Company, together with a government reservoir site, canals, ditches and water rights. Section 9410 of Revised Codes of Montana of 1935 provides that from the time the judgment is docketed it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases, which may continue for six years, unless the judgment is previously satisfied.

Another reference to the question, whether the property is subject to execution is found in Sec. 9424 R. C. M. 1935; and is as follows: "What shall be liable on execution—not affected until levy. All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all [69] property and rights of property, seized and held under attachment in the action, are liable to execution". The next question confronting the court is whether such property as that involved in this action is exempt from execution. The statutory provisions in respect to exemptions are found in Sections 9427 to 9430, 2 R. C. M. 1935. Counsel contend that the only exemption that might apply is found in Sec. 9428, subdivision 10, exempting "all court houses, jails, public offices, and buildings,

lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the court house, jail, and public offices belonging to any county of this state, and all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such city or town to health, ornament, or public use, or for the use of any fire or military company organized under the laws of the State. No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions. No person can claim more than one of the exemptions mentioned in the first six subdivisions of this section."

Directly preceding the above subdivision 10 appears the following introductory paragraph: "Specific exemptions. In Addition to the property mentioned in the preceding section, there shall be exempt to all judgment debtors who are married, or who are heads of families, the following property:" This paragraph seems to have but very little if any application to subdivision 10, which deals almost

entirely with public buildings and grounds. It is not apparent how the lands and works of the Reservoir Company could be exempt under the provisions of the above mentioned statute. The claim is made that the property of the Reservoir Company is appurtenant to the lands of the stockholders of the Brady Irrigation Company and to the [70] lands within the Bynum Irrigation District. But the exemption statute would not seem to apply for the apparent reason that it does not deal with the kind of property here involved. Considerable stress is placed upon the assertion that the Reservoir Company does not operate for profit; there seems to be no reason on that account alone why that company should be excused from payment. It appears that the work done by defendant Winston Brothers was for the enlargement and improvement of the reservoir of the former company and probably enhanced its value and increased the water supply. The defendant recovered a judgment on a promissory note given by the Reservoir Company for the price of these improvements and the debtor company refused payment of the balance due. If the exemption statute itself does not declare that where a judgment is obtained under such circumstances the defendant's property shall not be exempt from sale under execution, it is difficult to draw the line of demarkation. The statute says that "no article, however, or species of property mentioned in this section is exempt from execution issued upon a

judgment recovered for its price * * *". This was a judgment for the price of necessary additions to and improvements of the property of the debtor company. Even though the statute should be held to apply the foregoing provision would seem to raise a serious question whether it would be available to the Reservoir Company.

But there are other questions to be considered in order to determine whether Winston Brothers should be allowed to proceed under their judgment. A declaratory judgment is sought, to the effect that the judgment of Winston Brothers Company is not a lien upon the lands and premises of the Reservoir Company, and that they should be enjoined from claiming a lien or attempting to sell the property on execution. The theory is advanced in intervenor's brief that the real estate of the Reservoir company in fact belongs to Bynum Irrigation District, a public corporation, and therefore for reasons of public policy would be exempt from execution. In respect to the Reservoir Company there is nothing novel or unusual in its incorporation, organization or operation. While it may not be conducted for profit it ascertains the cost of operation and assesses its stockholders accordingly. If there should be a saving in the course of its operations [71] at any time would it not inure to the benefit of the stockholders. From time to time

repairs and improvements would be necessary and expense would have to be incurred and arrangements made for payment. Of course, they would expect to pay; they would not want to defeat an honest obligation by claiming that they had a mere naked title to the property, and that the water they stored belonged to someone else and the works as well; and that because one irrigation company owned eighty per cent of its (the Reservoir Company's) stock, and was a public corporation, that that thereby rendered it execution proof for reasons of public policy.

It appears that the Reservoir Company did not sell any land to the purchasers of its shares of stock, and under its by-laws the right to use the water was evidently a personal right and not limited to any specific land. The Brady Company owns no land but does own shares of stock in the Reservoir Company, and its (the Brady Company's) stockholders own land but no shares in the Reservoir Company. The right to the use of water by the stockholders of the Brady Company rests upon the ownership of stock by the Brady Company in the Reservoir Company, subject to such rules and regulations as may be adopted. The particular facts of the case will determine whether a water right is appurtenant to land as governed by Montana decisions. The court held in Maclay v. Missoula Irrigation District, 90 Mont. 344, 3 Pac. (2) 286: "The law on the subject of when water rights are

appurtenant to land and on the right to effect a severance is well established in this state. A water right, legally acquired, is in the nature of an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain lands as an appurtenance thereto. (Smith v. Denniff, 24 Mont. 20, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398). When a water right is acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, it is an appurtenance thereto, and, as such, passes with the conveyance of the land, unless expressly reserved from the grant. (Lensing v. Day & Hensen Co., 67 Mont. 382, 215 Pac. 999). This is so even though the grant does not specifically mention the water right. [72] (Yellowstone Valley Co., v. Associated Mortgage Investors, 88 Mont. 73, 70 A. L. R. 1002, 290 Pac. 255). Such a right may, however, be disposed of apart from the land to which it is appurtenant (Lensing v. Day & Hensen Co., above), and may be reserved from a grant of the land (Kofoed v. Bray, 69 Mont. 78, 220 Pac. 532)."

One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving it, and must connect himself with the title of the prior appropriator (Smith v. Denniff, 24 Mont. 20). One could purchase stock from a stockholder of the Brady Company and use it wherever he desired without regard to the use of water by the other stockholders; the stock of this

company could be transferred without the land; the sale of the land would not carry with it any stock of the above company unless so specified in the deed. If it were possible to hold that the stockholder's interest in the Brady Company is in effect an interest of a stockholder in the Reservoir Company, and that such interest gives the stockholder of Brady Company an interest in the water rights owned by the Reservoir Company, and that therefore such water right is appurtenant to the land of the Brady Company's stockholder and gives such stockholder title to the lands and works of the Reservoir Company, and that consequently the latter company holds only a naked legal title, then, under such circumstances, the theory of the plaintiff and intervener in substance at least, might have to be adopted.

The definition of appurtenance is given in Smith v. Denniff, Supra, at page 23, as follows: "Section 1078 of the Civil Code (Section 6671 R. C. M. 1935) defines an 'appurtenance' as follows: 'A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air or heat from or across the land of another'. A 'water course from or across the land of another' is an easement, and by reference to section 1250 of the Civil Code (Section 6749 R. C. M. 1935) it is plain that in the contemplation of the Code an appurtenance to land is in any and every case an easement."

This definition of the writer of the above decision is interestingly illustrated on pages 23 et seq. The court further held in the above case [73] on page 27: "Nor can it (the servitude upon the land across which his water is conveyed) be technically an appurtenance to the land upon which it exists, for, as we have seen, a burden or servitude, to be appurtenant to the land, must be a burden or servitude upon other land." Even though it should appear that the Brady Company's stockholders have an easement in the ditches of the Reservoir Company, would that circumstance render the property of the latter company immune from the lien of a judgment or sale on execution. Reference has been made to the case of Yellowstone Valley Company v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255, wherein appears an able opinion written by Chief Justice Callaway, which has been carefully considered by this court because of the reliance placed upon it by counsel for plaintiff. It is plain to be seen that the court in that case was dealing with an entirely different state of facts although the deductions might appear to have some bearing on the instant case. The court there held that under the facts shown the mortgage included the water rights represented by the shares of stock, which had been specifically enumerated and included therein, and further held: "we do not overlook the point that whether a water right evidenced by shares of stock is appurtenant to the land upon which the water is used is a question of fact. But,

upon the conceded facts, that question does not trouble us; clearly, the water is appurtenant to the land." It seems hardly possible to find from the language of the foregoing decision that the court intended the inference to be drawn that a stockholder in the Yellowstone Valley Company was an owner of an interest in the property of the company, and that this interest was appurtenant to the land which is irrigated.

Contrary to the theory of plaintiff it clearly appears from the cases cited by defendant, viz: Hyink v. Low Line Irrigation Company, 62 Mont. 401, and Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71, that a property interest has been shown to exist in the Reservoir Company and that this company cannot be held to possess merely a naked legal title under the Montana decisions.

Much stress has been placed upon the by-laws of the Reservoir Company as to its character as a corporation for profit, or otherwise: [74] as to that, the articles of incorporation would seem to be the best evidence, but they are not attached to the complaint as an exhibit, and nothing appears therein to indicate anything else than an ordinary corporation for profit. In Canyon Creek Irr. Dist. vs. Martin, 52 Mont. 339; 159 Pac. 418, after showing the stock had a commercial value, as in the case of the Reservoir Company, and the corporate purposes, the court held on page 344; "This fixes and determines the character of the reservoir company; in it

there is nothing suggestive of mutuality, nothing to indicate that the functions of the corporation are confined to the carriage of water to its members so as to make them, and not the corporation, the owners of its ostensible assets. If it be supposed, however, that this is made to appear from the by-laws offered but not received in evidence, the answer is that not in this way can the essential nature of the corporation be affected." Other cases relied upon by plaintiff are Gue v. The Tide Water Canal Company, 65 U. S. 257, 16 L. Ed. 635, and Eldredge v. Mill Ditch Company, 177 Pac. 939 (Ore.); the latter case is also cited by interveners Ackroyd, et al. The court has read these cases, bearing in mind the application made by counsel for both sides in this controversy, and is inclined to believe that neither of them is applicable to the facts of the present case; the reasoning found in defendant's brief in opposition to the application of these two cases as an authoritative guide appears to be correct. The principal ground of distinction between the Eldredge case and the present case is that the stockholders of the Reservoir Company do not own any land; the stock being held by the Brady Irrigation Company and the Bynum Irrigation District. The interveners are bondholders of Bynum Irrigation District, and the bonds appear to be a lien upon all of the land situated in that district; from the complaint in intervention it does not appear that any of the land of the Reservoir Company is in the Bynum Irrigation District.

There are no cases cited showing that a person who is not the owner of a water right can obtain an easement in a ditch for the conveyance of water for irrigation. The water right owner in the immediate case is the Reservoir Company and the rights of plaintiff and the Bynum Irrigation District are governed by contract with the Reservoir Company. [75]

This case presents rather a difficult situation for all concerned, and the difficulty is not likely to end with this decision, but the court has endeavored to keep in view the way to substantial justice. Of course, the best way out is to make arrangement for the payment of the judgment. It is quite evident that all who are using water from this reservoir are deriving benefit from the improvements made by defendant, in fact they are the chief beneficiaries.

The court has considered the pleadings, arguments of counsel for the respective parties, the constitution and statutes referred to, and many authorities, and being duly advised and good cause appearing therefor, is now of the opinion that the application for injunctive relief should be denied and that the three motions to dismiss should be granted and it is so ordered.

CHARLES N. PRAY
Judge.

[Endorsed] Filed Feb. 13, 1939. C. R. Garlow, Clerk. C. G. Kegel, Deputy Clerk. [76]

Thereafter, on April 14, 1939, Judgment of Dismissal was duly filed and entered herein, being in the words and figures following, towit: [77]

In the District Court of the United States in and for the District of Montana.—Great Falls Division.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

Interveners,

vs.

BRADY IRRIGATION COMPANY, a corporation,

Plaintiff,

and

WINSTON BROTHERS COMPANY, a corporation, TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation, and BYNUM IRRIGATION DISTRICT, a public corporation,

Defendants,

and

C. K. MALONE,

Intervenor.

Respondents.

JUDGMENT OF DISMISSAL.

The decision of the court having been filed with the Clerk of Court on February 13, 1939, denying the application for injunctive relief and ordering dismissed the complaint and the two complaints in intervention, hereinafter more fully described, and

It appearing to the court that notice of the entry of said decision and order was given to the plaintiff and to all the intervenors, hereinafter mentioned, and that more than ten (10) days has elapsed since said notice was so given, and that neither the plaintiff nor any of said intervenors have filed any amended pleadings whatsoever. [78]

Now therefore, on motion of the defendant, Winston Brothers Company, a corporation, it is hereby ordered, adjudged and decreed that the complaint of plaintiff, Brady Irrigation Company, a corporation, the complaint in intervention of the intervenor, C. K. Malone, and the bill of intervention of the intervenors, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, be and each of them is hereby fully and finally dismissed and that judgment of dismissal as to each of them be entered, and the defendant, Winston Brothers Company, have and recover as against said plaintiff and all of said intervenors, its costs herein which are hereby taxed and allowed at the sum of $10.00.

Given and made this 14 day of April, 1939.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed and entered April 14, 1939. C. R. Garlow, Clerk. [79]

Thereafter, on July 8, 1939, Notice of Appeal was duly filed herein by James A. Ackroyd, et al., Interveners, being in the words and figures following, to wit: [80]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. R. Garlow, Clerk of the above named Court, and to the parties to the above entitled action and their attorneys:

Notice is hereby given that James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, Interveners above-named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the court herein, entered in the above entitled action on April 14th, 1939.

This appeal is taken from the whole and every part of the judgment above described. [81]

Dated this 8th day of July, A. D. 1939.

STERLING M. WOOD
R. E. COOKE
FREDRIC MOULTON
By STERLING M. WOOD
Attorneys for Interveners,
Ackroyd, et al.
Securities Building,
Billings, Montana.

[Endorsed]: Filed July 8, 1939. C. R. Garlow, Clerk. [82]

Thereafter, on July 8, 1939, Cost Bond on Appeal was duly filed herein by James A. Ackroyd, et al., Interveners, being in the words and figures following, to wit: [83]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents:

That we, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, as Principals, and the Massachusetts Bonding and Insurance Company, a corporation, as Surety are held and firmly bound unto Winston Brothers Company, a corporation, in the full and just sum of Two Hundred Fifty Dollars ($250) to be paid to the said Winston Brothers Company, a corporation, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 7th day of July in the Year of [84] Our Lord 1939.

Whereas, lately in the above entitled action a judgment was rendered against the Interveners, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, therein, and the said Interveners are about to appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment, and the whole thereof, to reverse the said judgment;

Now, Therefore, the condition of the above obligation is such that if the above named Interveners shall pay all costs, if the said appeal is dismissed or judgment affirmed, or shall pay such costs as the appellate court may award if the said judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

In accordance with Rule 90 of the Rules of the above named District Court of the United States for the District of Montana, the said Massachusetts Bonding and Insurance Company, a corporation, the surety herein, expressly agrees that in case of a breach of any condition of this bond that the above named court, upon notice to the said surety of not less than ten days, may proceed summarily in the above entitled action in which this bond is being given, to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment therefor against the said surety, and award execution therefor.

JAMES A. ACKROYD,
DWIGHT S. BRIGHAM,
MORRIS F. LaCROIX,
EARLE L. CARTER,
J. EDWARD STEVENS and
FRANK E. NELSON
By STERLING M. WOOD
Their Atty in Fact.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
a corporation,
By ROBERT A. NATHAN, JR.
Its Atty. in Fact

[Seal]

[Endorsed]: Filed July 8, 1939. C. R. Garlow, Clerk. [85]

Thereafter, on July 11, 1939, Notice of Appeal was duly filed herein by Brady Irrigation Company, being in the words and figures following, to wit: [86]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS

Notice is hereby given:

That Brady Irrigation Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 14th day of April, 1939.

Dated this 11 day of July, A. D. 1939.

I. W. CHURCH
ART JARDINE
J. W. FREEMAN
J. N. THELEN
J. P. FREEMAN
ERNEST ABEL
By ERNEST ABEL
Attorneys for Plaintiff

[Endorsed]: Filed July 11, 1939. C. R. Garlow, Clerk. [87]

Thereafter, on July 11, 1939, Bond on Appeal was duly filed herein by Brady Irrigation Company, a corporation, being in the words and figures following, to wit: [88]

[Title of District Court and Cause.]

BOND ON APPEAL.

Know All Men by These Presents:

That National Surety Corporation, a corporation created and existing under the laws of the State of New York, and authorized to and doing business in the State of Montana, as a surety corporation, is held and firmly bound unto the above named defendant, Winston Brothers Company, a corporation, in the sum of Two Hundred Fifty and no/100 Dollars, $250.00, to be paid to the said Winston Brothers Company, a corporation, for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Whereas, the above named Brady Irrigation Company, a corporation, has prosecuted an appeal, or is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the Judgment rendered in the above entitled suit, by the Judge of the District Court of the United States, in and for the District of Montana;

[89]

Now, therefore, the undersigned, the National Surety Corporation, in consideration of the premises and of said appeal, does hereby undertake in the sum of Two Hundred Fifty and no/100 Dollars ($250.00) and promises to the effect that if the said plaintiff, Brady Irrigation Company, a corporation, shall pay all costs if the appeal is dismissed or the

judgment affirmed, and all such costs as the said Circuit Court of Appeals may award if said judgment is modified, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Dated this 11th day of July, 1939.

NATIONAL SURETY CORPORATION,

[Seal] By W. S. FRARY,

Attorney in Fact.

[Endorsed]: Filed July 11, 1939. C. R. Garlow, Clerk. [90]

Thereafter, on July 11, 1939, copies of notices of appeal were duly mailed to counsel herein, the docket record of such mailing of notices being in the words and figures following, towit: [91]

[Title of District Court and Cause.]

DOCKET ENTRIES:

July 11, 1939.

Mailed Copy notice of appeal of James A. Ackroyd, et al, to Freeman, Thelen & Freeman, Great Falls, Montana,; George Coffey, Choteau, Montana; and Cooper, Stephenson & Glover, Great Falls, Montana, attorneys.

July 11, 1939.

Mailed copy notice of appeal of Brady Irrigation District to Wood & Cook, Billings, Montana; George Coffey, Choteau, Montana; and Cooper, Stephenson & Glover, Great Falls, Montana, attorneys. [92]

Thereafter, on July 12, 1939, Stipulation as to Record on Appeal was duly filed herein, being in the words and figures following, towit: [93]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It Is Hereby Stipulated, by and between the attorneys for the respective parties to the above entitled action, as follows, to-wit:

I.

That this stipulation is made under Rule 75(f) of the Rules of Civil Procedure for the District Courts of the United States and in lieu of a designation under Rule 75(a) of said Rules of the contents of the record on appeal in the above en- [94] titled action;

II.

That the parts of the record to be included in the above entitled action on the appeal of said action to the United States Circuit Court of Appeals for the Ninth Circuit, shall be as follows, to-wit:

A. Complaint and petition for declaratory judgment of Plaintiff, Brady Irrigation Company, a corporation;

B. Motion of Defendant, Winston Brothers Company, a corporation, to dismiss bill of complaint;

C. Complaint in Intervention of C. K. Malone;

D. Motion of Defendant, Winston Brothers Company, a corporation, to dismiss complaint in intervention of C. K. Malone;

E. Bill of Intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson;

F. Motion of Defendant, Winston Brothers Company, a corporation, to dismiss bill of intervention of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson;

G. Order granting James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson leave to intervene;

H. Order and decision of Judge Pray of February 13th, 1939, granting motions to dismiss;

I. Judgment of dismissal of April 14th, 1939;

J. Notice of Appeal of James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson filed July 8th, 1939, together with portions of the clerk's civil docket designating the names of the persons to whom copies of the notices of [95] appeal were mailed with date of mailing;

K. Cost bond on appeal filed in connection with the notice of appeal designated in the last preceding paragraph hereof;

L. Notice of Appeal of Plaintiff, Brady Irrigation Company, a corporation, filed July 11th, 1939, together with portions of the clerk's civil docket designating the names of the persons to whom copies of the notices of appeal were mailed with date of mailing;

M. Cost bond on appeal filed in connection with the notice of appeal designated in the last preceding paragraph hereof.

N. A copy of this Stipulation.

Dated this 11th day of July, A. D. 1939.

I. W. CHURCH
ART JARDINE
J. W. FREEMAN
J. N. THELEN
J. P. FREEMAN
ERNEST ABEL
By ERNEST ABEL,
Attorneys for Plaintiff.

STERLING M. WOOD
R. E. COOKE
FREDERIC MOULTON
By STERLING M. WOOD
Attorneys for Interveners, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson.

R. H. GLOVER
S. B. CHASE, JR.
JOHN D. STEPHENSON
By S. B. CHASE, JR.
Attorneys for Defendant, Winston Brothers Company, a corporation.

[Endorsed]: Filed July 12, 1939. C. R. Garlow, Clerk. [96]

In the District Court of the United States in and for the District of Montana, Great Falls Division

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 97 pages, numbered consecutively from 1 to 97 inclusive, is a full, true and correct transcript of all matter designated by the parties as the record on appeal in case No. 3053, Brady Irrigation Company vs. Winston Bros. Company, et al., as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twenty-two and 80/100 Dollars ($22.80), and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 28th day of July, 1939.

C. R. GARLOW,
Clerk as aforesaid.
By C. G. KEGEL,
Deputy.

[Seal] [97]

[Endorsed]: No. 9251. United States Circuit Court of Appeals for the Ninth Circuit. James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, Appellants, vs. Winston Brothers Company, a corporation, Appellee, and Brady Irrigation Company, a corporation, Appellant, vs. Winston Brothers Company, a corporation, Appellee. Transcript of Record Upon Appeals from the District Court of the United States for the District of Montana.

Filed July 31, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 9251.

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

Intervenors,

vs.

BRADY IRRIGATION COMPANY, a corporation,

Plaintiff,

and

WINSTON BROTHERS COMPANY, a corporation, TETON CO-OPERATIVE RESERVOIR COMPANY, a corporation, and BYNUM IRRIGATION DISTRICT, a public corporation,

Defendants.

and

C. K. MALONE,

Intervenor,
Respondents.

STATEMENT OF THE POINTS ON WHICH APPELLANT, BRADY IRRIGATION COMPANY, INTENDS TO RELY, AND OF THE PARTS OF THE RECORD WHICH SAID APPELLANT THINKS NECESSARY FOR THE CONSIDERATION THEREOF.

The appellant, Brady Irrigation Company, intends to rely upon the contentions that the District Court erred:

1. In granting the Motion of the defendant, Winston Brothers Company, a corporation, to dismiss the plaintiff's Complaint and Petition for a Declaratory Judgment upon the following grounds, to-wit:

a. That the plaintiff was entitled to a Judgment declaring the rights of the parties to the lands and premises, the legal title to which is held by Teton Cooperative Reservoir Company, which are necessary for irrigation purposes.

b. That the plaintiff has an easement in and to the lands necessary for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company, for the purpose of storing, diverting and carrying water for irrigation purposes to the lands of the stockholders of said plaintiff corporation, and that such easement is appurtenant to the lands irrigated with such waters.

c. That the plaintiff has an interest in the lands necessary for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company.

2. In Dismissing the plaintiff's Complaint and Petition for Declaratory Judgment.

3. In rendering Judgment dismissing the plaintiff's Complaint and Petition for Declaratory Judgment.

4. In holding that the appellant, Brady Irrigation Company, was not entitled to a Judgment, declaring the rights and easements of said Brady Irri-

gation Company, by reason of its ownership of one hundred fifty-six (156) shares of the capital stock of Teton Cooperative Reservoir Company, in and to the property used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

5. In failing to hold that the appellant, Brady Irrigation Company, was entitled to a Judgment declaring the rights of said Brady Irrigation Company, by reason of its ownership of 156 shares of the capital stock of Teton Cooperative Reservoir Company, in and to the property used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

6. In holding that the Appellee, Winston Brothers Company, a corporation, has a lien enforceable by a Writ of Execution and Sale against the property necessary and used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

7. In refusing to declare the rights of the appellant, Brady Irrigation Company, in and to the land necessary and used for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company.

8. In holding that the Judgment of the appellee, Winston Brothers Company, a corporation, is a lien enforceable by a Writ of Execution and Sale against the property which is necessary and is used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

9. In failing to hold that the appellant, Brady Irrigation Company, was not entitled to a Judgment declaring that any lien which the appellee, Winston Brothers Company, a corporation, may have against the land described in the Complaint and held by Teton Cooperative Reservoir Company, is subject to an easement of the appellant, Brady Irrigation Company, for the purpose of diverting, storing and carrying water for irrigation purposes on and across said land.

10. In holding that the plaintiff, Brady Irrigation Company, a corporation, was not entitled to an injunction restraining a sale under a Writ of Execution, of the property necessary and used for irrigation purposes, the legal title to which stands in the name of Teton Cooperative Reservoir Company.

11. In holding that the appellant, Brady Irrigation Company, does not have an easement in and to the lands necessary for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company, which easement is unaffected and superior to the lien of any Judgment of the appellee, Winston Brothers Company, a corporation.

12. In holding that the lands necessary for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company, are not appurtenant to the lands of the stockholders of the appellant, Brady Irrigation Company, irrigated with waters diverted, impounded and stored by means of the irrigation works under the supervision of Teton Cooperative Reservoir Company.

13. In not denying the motion of the appellee, Winston Brothers Company, a corporation, to dismiss the plaintiff's Complaint and petition for Declaratory Judgment.

14. In the rendition of the final Judgment in this case, filed and entered herein on the 14th day of April, 1939.

The appellant, Brady Irrigation Company, deems the entire record as filed with the clerk of this Court, and designated in the Stipulation as to the record on appeal filed in the office of the District Court herein, which Stipulation is incorporated as a part of said record, necessary for the consideration of the contentions above enumerated.

Dated this 5th day of August, A. D. 1939.

I. W. CHURCH
ART JARDINE
J. W. FREEMAN
J. P. FREEMAN
ERNEST ABEL
By J. W. FREEMAN
Attorneys for Appellant.

Service of the foregoing Statement and Designation is hereby acknowledged this 5th day of August, 1939.

S. B. CHASE, JR.
R. H. GLOVER
JOHN D. STEPHENSON
Attorneys for Respondent,
Winston Brothers Company, a corporation.

[Endorsed]: Filed Aug. 8, 1939.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS, JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS AND FRANK E. NELSON, INTEND TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD WHICH SAID APPELLANTS THINK NECESSARY FOR THE CONSIDERATION THEREOF.

The Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, intend to rely, upon the appeal in the above-entitled action, on the contentions that the District Court erred:

1. In granting the motion to dismiss of the Appellee, Winston Brothers Company, a corporation, directed at the bill of intervention of the said Appellants;

2. In rendering and entering the final judgment below of April 14th, 1939, dismissing the said action.

The points of law upon which the said Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, intend to rely, stated in general terms, are as follows, towit:

1. That the Appellant, Brady Irrigation Company, a corporation, and the Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix,

Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, were entitled to a declaratory judgment declaring that the Appellee, Winston Brothers Company, is without right, under the judgment it has obtained against the Teton Co-Operative Reservoir Co., or under any writ or writs of execution issued thereon, to sell, either at Sheriff's sale or otherwise or at all, any of the real estate of the said Teton Co-Operative Reservoir Co., and that the said Appellee, Winston Brothers Company, has no lien under the said judgment upon the said real estate;

2. That the said Teton Co-Operative Reservoir Co. holds its real estate in trust for its stockholders as the cestuis que trust and that, accordingly, such real estate is not subject to levy under execution upon any judgment against the said Teton Co-Operative Reservoir Co.;

3. That, in effect, the real estate of the Teton Co-Operative Reservoir Co., involved in this action, belongs to Bynum Irrigation District, a public corporation of the State of Montana, and that, hence, for reasons of public policy such real estate is exempt from execution;

4. That the judgment lien and execution statutes of Montana do not apply to the real estate of the Teton Co-Operative Reservoir Co. in view of the fact that such real estate is, in fact, public property necessarily used by a public corporation in the discharge of its public duties.

The said Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, deem the entire record, as certified to this Court and on file herein, to be necessary for the consideration of the contentions and points of law enumerated above.

Therefore, pursuant to Rule 18, Par. 6, of the Rules of this Court, the Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson, designate for printing herein the entire record so certified and filed.

Dated this 9th day of August, A. D. 1939.

STERLING M. WOOD
R. E. COOKE
By STERLING M. WOOD
Attorneys for Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson.

[Endorsed]: Filed Aug. 11, 1939.

No. 9251

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,
Appellants,

vs.

WINSTON BROTHERS COMPANY (a corporation),
Appellee,

and

BRADY IRRIGATION COMPANY (a corporation),
Appellant,

vs.

WINSTON BROTHERS COMPANY (a corporation),
Appellee.

BRIEF OF APPELLANTS, JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS, AND FRANK E. NELSON.

STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,
Security Building, Billings, Montana,
Attorneys for Appellants, James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens, and Frank E. Nelson.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,
Appellants,

vs.

WINSTON BROTHERS COMPANY (a corporation),
Appellee,

and

BRADY IRRIGATION COMPANY (a corporation),
Appellant,

vs.

WINSTON BROTHERS COMPANY (a corporation),
Appellee.

BRIEF OF APPELLANTS, JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LACROIX, EARLE L. CARTER, J. EDWARD STEVENS, AND FRANK E. NELSON.

STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTS.

This action was instituted in the District Court of the United States for the District of Montana by Ap-

pellant Brady Irrigation Company, a corporation, as Plaintiff, against the Appellee Winston Brothers Co., a corporation, Teton Co-Operative Reservoir Co., a corporation, and Bynum Irrigation District a public corporation, as Defendants. The bill of complaint (also denominated a petition for declaratory judgment) (Tr. 3) alleges the requisite diversity of citizenship. The controversy, as disclosed by the bill of complaint, is between the Appellant Brady Irrigation Company, a citizen and resident of the State of Montana, and the Appellee, a citizen and resident of the State of Minnesota. The remaining Defendants, citizens and residents of the State of Montana, were named Defendants, pursuant to Equity Rule 37, by reason of their refusal on demand to join as Plaintiffs in the prosecution of the suit. The prayer of the bill of complaint is, substantially, for a declaratory judgment that the Appellee under a certain judgment obtained by it in a Montana state court, has no lien upon or right to sell certain real estate in which Brady Irrigation Company and Teton Co-Operative Reservoir Co., as well as Bynum Irrigation District, have an interest. That real estate is necessarily used as a reservoir, dam-site, etc., to supply the three last named corporations with water for irrigation purposes.

The Appellants James A. Ackroyd, Dwight S. Brigham, Morris F. LaCroix, Earle L. Carter, J. Edward Stevens and Frank E. Nelson, *hereinafter referred to as the Appellants, Ackroyd, et al.,* intervened by leave of court and joined the Appellant Brady

Irrigation Company in a demand for a declaratory judgment. The said Appellants Ackroyd, et al., are non-residents of the State of Montana and have a substantial interest in the matter in controversy in that certain bonds owned by them, aggregating $923,000 of principal, and issued by Bynum Irrigation District would be rendered worthless if the Appellee were permitted, under its said state court judgment, to sell the real estate of Teton Co-Operative Reservoir Co. upon which a lien by virtue of that judgment is claimed. That real estate is an essential part of an irrigation system that provides the only source of water supply for the irrigation of lands in Bynum Irrigation District, to which lands the Appellants Ackroyd, et al. must look for the payment of their bonds. Without water from such irrigation system those lands would be practically worthless.

The Appellee attacked the bill of complaint of Brady Irrigation Co. and the bill of intervention of the Appellants Ackroyd, et al., by separate motions to dismiss which were sustained and thereupon judgment of dismissal of the action was rendered. The action has been treated at all times as one for equitable relief by declaratory judgment.

The jurisdiction of the District Court of the United States for the District of Montana is based on U. S. Codes, Title 28, Section 41, subdivision 1, which provides that such court shall have original jurisdiction where the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000 and is between citizens of different states.

The jurisdiction of this court is based on U. S. Codes, Title 28, Section 225, which provides that the Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions of the district courts.

STATEMENT OF THE CASE.

The following is a resume, made as brief as possible, of the facts pleaded in the bill of intervention. The Appellants Brady Irrigation Company and Ackroyd, et al., have appealed separately (Tr. 95 and 98) from the judgment (Tr. 94) dismissing the action and, by separate briefs, will present their several contentions in this court. This statement of the case relates only to the bill of intervention of the Appellants Ackroyd, et al. and to the contentions of such Appellants.

Inasmuch as the action was disposed of in the trial court upon motions to dismiss, the allegations of the bill of intervention of the Appellants Ackroyd, et al., must be taken as admitted for the purposes of this appeal.

Payne v. Central Pacific Ry. Co., 255 U. S. 228, 65 L. Ed. 598 and 601.

Bynum Irigation District is a *public* corporation of the State of Montana. It has been engaged in business as a public irrigation district ever since on or about the year 1925, and, primarily, to provide lands within the district with water to irrigate the same. On July 1st, 1925, Bynum Irrigation District issued, negotiated

and sold its 6% gold bonds, aggregating the principal amount of $1,000,000, and the Appellants Ackroyd, et al., own $923,000 of the principal amount of those bonds, none of which has been paid.

Teton Co-Operative Reservoir Co. is a Montana corporation which was organized primarily to make water appropriations under the laws of Montana and to distribute water for the irrigation of lands within the state. That company has made appropriations of water, has constructed a reservoir into which waters have been diverted and impounded and has distributed water therefrom to large tracts of land for irrigation purposes, in the conduct of its business. The said Teton Co-Operative Reservoir Co. has acquired and owns real estate in Teton County, Montana, upon which it has constructed improvements, consisting of the aforesaid reservoir, embankment for the same, dams, headgates, canals, and all other necessary structures for the proper diversion, impounding and distribution of water for irrigation purposes, and all of such real estate and the appurtenances are needed by the company for the conduct of its business. Furthermore Teton Co-Operative Reservoir Co. has engaged in no other business than the appropriation, diversion, impounding and distribution of water for the irrigation of lands, and *that business has been conducted at all times without profit to the said company or its stockholders, water having been distributed by the company at the actual cost of the service and for the use of its stockholders and no other persons whomsoever.* Each share of capital stock of Teton Co-

Operative Reservoir Co. represents the right of the owner thereof to an undivided one-thousandths part of water appropriated, impounded and distributed by the company and the ownership of a right to such water for the irrigation of lands. It should be particularly noted that *Teton Co-Operative Reservoir Co. has been operated at all times since its organization:*

> *"Only as an instrumentality or agency of its stockholders* for the appropriation, impounding and distribution of water for the irrigation of lands." (Tr. 64.)

In 1925 Bynum Irrigation District was wholly without water for the irrigation of lands within its boundaries, and then acquired, from the proceeds of the aforesaid million dollar bond issue, 804 shares of the capital stock of Teton Co-Operative Reservoir Co. to the end that Bynum Irrigation District might acquire an adequate supply of water for the irrigation of lands within the district. These 804 shares constitute 80.4% of the issued and outstanding capital stock of the said Company. Before this stock purchase was consummated the right of Bynum Irrigation District to thus provide itself with water for irrigation purposes was tested by a case, brought by one Thaanum, that went to the Supreme Court of Montana. That court, by its final decision, sanctioned the purchase of the stock of Teton Co-Operative Reservoir Co. and declared that the district had the power and authority to make the purchase. The said court in its decision sustained the action of Bynum Irrigation District, in the acquisition of a water supply

through the purchase of stock, and by virtue of a state statute which gave the district the "power * * * to acquire by purchase, lease, or contract, water and water rights", etc., but that statute did not in terms mention such a stock purchase as the District made.

Ever since 1925 Bynum Irrigation District, as the owner of 804 shares of the capital stock of the Teton Co-Operative Reservoir Co., has controlled that company and its business and affairs and has operated the company for the use and benefit of Bynum Irrigation District and the few remaining stockholders of the company, the latter holding only 19.6% of its stock.

The lands within Bynum Irrigation District would be arid and dry and have negligible value without the water and water rights acquired by the purchase of the capital stock of Teton Co-Operative Reservoir Co., and the value of such lands without such water would be wholly insufficient to enable Bynum Irrigation District, by the assessment of the lands, to pay the bonds of the Appellants Ackroyd, et al., or any substantial portion thereof.

In 1927 the Appellee acquired from Teton Co-Operative Reservoir Co. the latter's promissory note which represented an indebtedness incurred in and about the conduct of its corporate business and affairs. At the time the indebtedness was incurred, and when the promissory note mentioned was executed and delivered, the Appellee then and there well knew that Teton Co-Operative Reservoir Co. was the instrumentality and agency through and by which Bynum Irrigation District supplied water for irrigation pur-

poses to lands in the district and that the District had no other means of supplying water to the same. It is also alleged in this connection in the bill of intervention of the Appellants Ackroyd, et al., that the Appellee then knew all of the other matters and things above mentioned in this resume, and pleaded in the said bill of intervention.

The Appellee brought an action upon the promissory note mentioned and recovered a judgment against Teton Co-Operative Reservoir Co. in a Montana state district court. As a result Appellee claims a lien under the judgment upon the real estate above-mentioned, held by Teton Co-Operative Reservoir Co., and necessarily used for the impounding and distribution of water and for the irrigation of lands in Bynum Irrigation District. Appellee further claims the right, under the judgment, to levy upon such real estate by writ of execution and to cause the same to be sold at sheriff's sale and to deprive Teton Co-Operative Reservoir Co. and Bynum Irrigation District of the property, all of which said property is indispensable to the operation of Bynum Irrigation District as a public corporation and to the delivery of water for irrigation purposes to the lands in the said District.

It is finally alleged in the bill of intervention that the claims of the Appellee are without right, that a sale of the aforesaid real estate under execution would jeopardize and destroy the rights and liens of the Appellants Ackroyd, et al. under their bonds, and that the Appellee is without right to cause the said real

estate, or any part of it, to be sold under the judgment or under any writs of execution issued thereon.

It is on the basis of the foregoing facts, pleaded in the bill of intervention, that the Appellants Ackroyd, et al., claim the right, as intervenors, to join with the Appellant Brady Irrigation Company, and to have a declaratory judgment rendered (a) that the Appellee is without right under its judgment against Teton Co-Operative Reservoir Co., or under any writs of execution issued thereon, to sell, either at sheriff's sale or otherwise or at all, any of the real estate of the said Teton Co-Operative Reservoir Co. and (b) that the Appellee has no lien under the said judgment upon the said real estate. There is also a prayer for general relief.

In substance the Appellants Ackroyd, et al. take the position here, as in the trial court, that the public character of the real estate involved, in which Teton Co-Operative Reservoir Co. has but a bare legal title, is such that it may not be sold under the judgment obtained by the Appellee. The only remedy the Appellee may invoke is mandamus, under the former practice in the Federal courts, to compel the district to levy charges as taxes, like any other public corporation, and thereby, through collection of such taxes, to raise its proportionate part of the money required to pay the judgment. There is a liability also on the part of the few remaining stockholders of Teton Co-Operative Reservoir Co. that can be enforced against them. But it would be against public policy, contrary

to settled law, and without warrant of any state statute, for the Appellee to dispose of the real estate of Teton Co-Operative Reservoir Co., by sale under the judgment, since such a sale would make it wholly impossible for Bynum Irrigation District to exist and function as a *public corporation.*

SPECIFICATION OF ERRORS.

Specification of Error No. 1.

The trial court erred in granting the motion to dismiss of the Appellee Winston Brothers Co., a corporation, directed at the bill of intervention of the Appellants Ackroyd, et al.

Specification of Error No. 2.

The trial court erred in rendering and entering its final judgment of April 14th, 1939, dismissing this action.

ARGUMENT.

I.

PRELIMINARY AND BASIC QUESTIONS.

Before arguing the contention that the real estate involved is neither subject to lien nor sale under the judgment obtained by the Appellee, there are certain basic questions in the case that should be settled. Thus:

(A)

THE PUBLIC CHARACTER OF THE PROPERTY INVOLVED.

It is alleged in the bill of intervention, and, hence, admitted for all purposes on this appeal, that Bynum Irrigation District, is a *public* corporation, duly created, organized and existing as such under the provisions of Chapter 146, Laws of Montana, 1909, and the acts amendatory thereof and supplemental thereto, and that ever since on or about the year 1925 the said District has been engaged in business as an irrigation district and primarily to provide the lands within the district with water to irrigate the same. (Tr. 59.) Chapter 146 mentioned is embraced in the irrigation district statutes now found in the 1935 Civil Code of Montana. Section 7169 thereof, in its final paragraph, reads as follows:

> "Every irrigation district so established hereunder is hereby declared to be a public corporation for the promotion of the public welfare."

Section 7201 provides:

> "The use of all water required for the irrigation of the land of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoir, and all property required in fully carrying out the provisions of this act, is hereby declared to be a public use."

In Section 7262 it is declared that:

> "The object of this act being to secure the irrigation of lands of the state, and thereby to promote the prosperity and welfare of the people, its

provisions shall be liberally construed so as to effect the objects and purposes herein set forth."

This statutory law establishes clearly the very public character of Bynum Irrigation District. *Any property necessarily used by it for irrigation district purposes would be public property, and, plainly, the character of ownership thereof, if authorized by law, does not affect its public character.*

In addition to the foregoing statutes it should be noted, too, that under Section 7235, relating to irrigation districts, provision is made for the levy of annual taxes by a district. By Section 7240.1, when the required taxes are not levied by the irrigation district commissioners, the board of county commissioners is required to make the tax levy for the district. In every sense of the word an irrigation district is as much a subdivision of the state for governmental purposes as are cities, towns and school districts. Thus in *Crow Creek Irrigation District v. Crittenden,* 71 Mont. 66, 227 Pac. 63, the court said:

> "An irrigation district organized under the laws of this state does exercise some governmental functions; for example, it may levy taxes * * * which is the exercise of one of the highest prerogatives of sovereignty."

In conclusion in that case the court said:

> "To summarize: An irrigation district is a public corporation organized for the government of a portion of the state and for the promotion of the public welfare. It exercises essential governmental functions, and one of its principal

> officers is the county treasurer. It may not expend its funds without the approval of public officers, and the interest on its bonds is not subject to the federal income tax laws. So far as it was possible to do so the legislature has emphasized its public character and expressed an intention that it shall be relieved of the ordinary burdens which are imposed upon private enterprises. From these considerations we think it is fairly deducible that it was the purpose of the legislature that an irrigation district should be deemed a subdivision of the state within the meaning of Section 4893, Revised Codes."

In *Brown Bros. v. Columbia Irrigation District* (Wash.) 144 Pac. 74, the case is decided upon the general proposition that an irrigation district is a public body and, as the court very aptly says:

> "The power to drain, irrigate, or dyke land might have been given to the counties. If it had been, they would have been exercising a municipal function just as a city does when it paves a limited area or district by special assessments against the property benefited."

In *O'Neill v. Yellowstone Irrigation District, et al.,* 44 Mont. 492, 505 and 506, 121 Pac. 283, the Supreme Court of Montana points out that the so-called "Wright Law" of California is similar in purpose and character to the Montana irrigation district act. That irrigation districts in California are public corporations, quasi municipal corporations, or state agencies, performing governmental functions, is pointed out clearly, in a summarization of the Cali-

fornia authorities on the subject, in the case of *In re Lindsay-Strathmore Irrig. District,* 21 F. Supp. 129 and 134. Among other California authorities cited is that of *In re Madera Irrigation District,* 28 Pac. 272. We quote briefly from that case, to-wit:

> "In determining whether any particular measure is for the public advantage, it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other than any advantage which accrues to one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public."

Continuing, the court in the *Madera Irrigation District* case said:

> "Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the state, or to promote its material development, is for the advantage of the entire state. * * * The local improve-

ment contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement."

In *Mound City Land & Stock Company v. Miller* (Mo.) 70 S. W. 721, the Court considers the constitutionality and status of drainage districts in the State of Missouri and places them in the same class with irrigation districts in other states. Thus the Court says:

"Levees keep out the water. Irrigation canals bring in the water. Drains take out the water. The public has an interest in each kind of such laws. By keeping out the water, the health of the inhabitants is conserved and the value of the lands increased, and the revenues of the state enhanced. Thus the state is directly interested both for sanitary and financial reasons. The irrigation laws bring in the water and make valuable the arid lands, and thereby enhance their value, and, hence, bring in more revenue to the state. Thus the state has a direct pecuniary interest, although not a sanitary interest."

Continuing the court says:

"California, Pennsylvania, Illinois, Michigan, Ohio and New Jersey have reclamation laws, based upon the same principles as our statute. * * * It is competent for the state to raise up a governmental agency for the enforcement of its police powers and for the purpose of enhancing its revenues and carrying its revenue laws into effect. The agency thus created is an arm of the

> state, a political subdivision of the state and exercises prescribed functions of government and is not a private corporation in any sense."

It cannot be gainsaid that Bynum Irrigation District, as a public corporation, carries on a public work for the promotion of the public welfare nor that property necessary to the conduct of that work is used for public purposes.

(B)

THE EFFECT OF THE CONTROLLING CASE OF THAANUM v. BYNUM IRRIGATION DISTRICT, 72 MONT. 221, 232 PAC. 528.

It is alleged in paragraph XIII of the bill of intervention (Tr. 64) of the Appellants, Ackroyd, et al.:

> "That Bynum Irrigation District was organized for the purpose of irrigating large tracts of land in Teton County, Montana, and that on or about the year 1925 the said Bynum Irrigation District, being wholly without water for the irrigation of such land, made and entered into an agreement to purchase, for a consideration of $500,000, payable from the proceeds of the $1,000,000 bond issue * * * 804 shares of the capital stock of * * * Teton Co-Operative Reservoir Co., being 80.4 per cent of the issued and outstanding capital stock of the said Company, to the end that thereby the said Bynum Irrigation District might acquire an adequate supply of water for the irrigation of the lands within the said District."

As the statement of the case herein makes plain Teton Co-Operative Reservoir Co. holds the legal title to the real estate involved in this action which the Appellee threatens to sell under its judgment. That

real estate is necessarily used by the said Teton Co-Operative Reservoir Co. for the diversion, impounding and distribution of water for irrigation purposes.

It is further alleged in said paragraph XIII (Tr. 65) of the said bill of intervention that:

> "On or about the year 1925 one W. A. Thaanum, an owner of land in the said District (meaning the Bynum Irrigation District), instituted a certain action to restrain the said District and its Board of Commissioners from expending any money belonging to the said District for the purchase of the said 804 shares of capital stock above mentioned, and that thereafter in the said action, and on or about the year 1925, the Supreme Court of the State of Montana duly adjudged that the said District and its said Board of Commissioners, * * * had the power and authority to purchase the said 804 shares of capital stock of Teton Co-Operative Reservoir Co., and that the judgment rendered is in full force, virtue and effect."

The Thaanum action is the one cited in the foregoing caption to this argument. The Supreme Court of Montana sanctioned the purchase of shares of the capital stock of the Teton Co-Operative Reservoir Co. and did so by virtue of the provisions of subdivision 3, Section 7174, Revised Codes of Montana, 1921, as amended by Chapter 157, Laws of Montana, 1923. This circumstance is pleaded in the bill of intervention and has been admitted with the other facts pleaded, supra. The statute mentioned provides in substance that the board of an irrigation district shall have power and authority to acquire by purchase,

lease, or contract, water and water rights, rights of way for reservoirs, the storage of needful waters, dam sites and appurtenances, and such other lands and property as may be necessary for the operation of any district system of irrigation works. It should be borne in mind in this connection that, when this purchase of stock was made, Bynum Irrigation District had no water rights of any sort for the irrigation of lands in the district, and, hence, that the purchase of such stock was necessary to enable Bynum Irrigation District to function as a public corporation.

The following further allegations of the bill of intervention of the Appellants Ackroyd, et al., that have been admitted, should also be noted, to-wit:

> "That the said Company (meaning Teton Co-Operative Reservoir Co.) has been operated at all times since its organization only as an instrumentality or agency of its stockholders for the appropriation, impounding and distribution of water for the irrigation of lands." (Tr. 64.)
>
> "That the said capital stock of the said Teton Co-Operative Reservoir Co. so purchased as aforesaid, constitutes and is the sole source of water supply for the said Bynum Irrigation District and is indispensable, in its entirety, to the conduct of the business of the said Bynum Irrigation District as a public corporation." (Tr. 65 and 66.)
>
> "That upon the purchase of the said shares of capital stock of Teton Co-Operative Reservoir Co. the said Bynum Irrigation District and its Board of Commissioners duly apportioned water for irrigation among the lands in the district, as

required by law, and in a just and equitable manner, being the water acquired by the purchase of the said stock, and that such water thereupon became, ever since has been and now is appurtenant to such lands and inseparable from the same." (Tr. 66.)

"That ever since on or about the year 1925 the said Bynum Irrigation District, as the owner of the aforesaid 804 shares of capital stock, and through its Board of Commissioners, has controlled the said Teton Co-Operative Reservoir Co. and its business and affairs, and has operated the said Company for the use and benefit of the said Bynum Irrigation District and the other stockholders of the said Company." (Tr. 67.)

Since Bynum Irrigation District necessarily acquired the water stock in question and had the legal right so to do, that stock and all it represents, namely, the irrigation system involved, became *public property* in every sense of that term. There is no difference in fact or in law, as regards the acquisition of water rights for Bynum Irrigation District, between the purchase of stock of Teton Co-Operative Reservoir Co., with the consequent control of its business and affairs, and the purchase of the irrigation system of that Company, consisting of the real estate here involved and the appurtenances. The District could lawfully acquire its water rights by either method. In legal effect, as a result of the *Thaanum* case, the Bynum Irrigation District did acquire the irrigation system of the Teton Co-Operative Reservoir Co. by the stock purchase. The said Company, after the

stock purchase was made, became a mere holding company, agent or trustee, for Bynum Irrigation District. Had the District purchased the irrigation system outright, instead of the stock, no contention could properly be made that the said system is not now used for a public purpose. Nor could any claim be made legitimately under such circumstances that the use of the irrigation system to carry some surplus water (not needed by the District) detracts from the major use of the system for a public purpose by the District. The acquisition of 80.4% of the stock of Teton Co-Operative Reservoir Co., leaving only 19.6% in private hands, creates no different condition in legal effect than if the District had bought the irrigation system and allowed surplus water, to the extent of 19.6% of the entire supply, to go to a few private persons. The law (Sec. 7204, Revised Codes of Mont. 1935) permits a district to dispose of surplus water.

It is also proper in this connection to contend, as we do, that the *water rights,* which, under the *Thaanum* case, Bynum Irrigation District acquired by purchasing a controlling stock interest in the Teton Co-Operative Reservoir Co. are owned by Bynum Irrigation District. The statute construed in the *Thaanum* case authorizes the district to acquire water and water rights. While the law provides, in Section 7202, Revised Codes of Montana, 1935, that the *amount of water* that can be beneficially used on each tract of land in an irrigation district and that has been apportioned to the same by the district commissioners "shall become and shall be appurtenant to

the land and inseparable from the same", nevertheless the *water right* itself, as property, is owned by the District, as the following irrigation district statutes make clear, to-wit:

(a) Sec. 7174, Par. 3, R. C. Mont. 1935, authorizes a district to acquire "water rights"; (This is the statute construed in the *Thaanum* case.)

(b) Sec. 7204 permits all surplus water "belonging" to a district to be sold by the district; and

(c) Sec. 7217 (in the original irrigation district act but now repealed) provides that the report of the irrigation district bond commission shall give the value of the *water rights* "owned" by a district.

Water rights, of necessity, do not exist apart from but rather by virtue of the dams, ditches, reservoirs, etc., that, after appropriation of water, bring about the diversion thereof and its resultant beneficial use. Thus, the irrigation system of Teton Co-Operative Reservoir Co. comprises part of the "water rights" now owned by Bynum Irrigation District. Those water rights are *public property* necessarily used by the public corporation in question.

Attention should be called to one more controlling authority. It is the case of *Brady Irrigation Company v. Teton County, et al.,* 107 Mont. 330, 85 Pac. (2d) 350. There the effort had been made by the taxing authorities of Teton County, Montana, to tax

the irrigation facilities of Teton Co-Operative Reservoir Co. that are involved in the suit at bar. Judgment was rendered in the *Teton County* case, and affirmed on appeal, enjoining the issuance of a tax deed to such irrigation facilities. The court brushed aside the veil of the corporate identity of Teton Co-Operative Reservoir Co. and held that the irrigation facilities held by that non-profit corporation were not subject to taxation. In effect it recognized that the irrigation system, that Appellee here claims the right to levy upon under execution, is but part of the water rights owned by Bynum Irrigation District when it said: "They (the ditches, etc.) have no independent use"; that is, a use independent of the lands in Bynum Irrigation District, etc., that use the irrigation water provided by the irrigation system.

The lower court in its decision has disregarded the basic principles settled in the foregoing subdivisions of the argument. Applying those principles, as must be done in a proper disposition of this case, it will follow, under the argument and authorities, infra, that the said real estate may not be sold under the judgment of the Appellee and that the judgment does not create a lien upon the real estate. No question of *exemption* from execution is involved. The statutes of Montana simply do not confer the right to a lien or to a levy by execution against public property owned and used as is the aforesaid real estate.

II.

AS TETON CO-OPERATIVE RESERVOIR CO. IS A MERE TRUSTEE OF THE REAL ESTATE INVOLVED IN SUIT AND WITHOUT ANY BENEFICIAL INTEREST THEREIN, SUCH REAL ESTATE IS NOT SUBJECT TO LEVY UNDER EXECUTION.

Again we stress the allegations of the complaint of intervention, admitted by the motion to dismiss, that:

> "Teton Co-Operative Reservoir Co. has engaged in no other business than the appropriation, diversion, impounding and distribution of water for the irrigation of lands, and that such business has been conducted at all times without profit to the said company or its stockholders; that water has been so distributed by the said company at the actual cost of the service and for the use of its stockholders and no other persons whomsoever; * * * that at all times since the organization of the said company the said capital stock has evidenced the ownership of a right to water for the irrigation of land * * *; and that the said company has been operated at all times since its organization only as an instrumentality or agency of its stockholders for the appropriation, impounding and distribution of water for the irrigation of lands." (Tr. 63 and 64.)

> "That ever since on or about the year 1925 the said Bynum Irrigation District, as the owner of * * * 804 shares of capital stock, and through its board of commissioners, has controlled the said Teton Co-Operative Reservoir Co. and its business and affairs, and has operated the said company for the use and benefit of the said Bynum Irrigation District and the other stockholders of the said company." (Tr. 6.)

In other words, Teton Co-Operative Reservoir Co., under the admitted facts in the case at bar, is but a trustee holding a naked legal title to the irrigation system that supplies water to Bynum Irrigation District, and the entire beneficial interest in those water facilities is vested in the holders of stock of Teton Co-Operative Reservoir Co., which include Bynum Irrigation District that holds 80.4% of such stock.

In 21 Am. Jur., Executions, Par. 428, it is said:

> "It is not every legal interest that is subject to levy and sale under execution; *to support the execution, the debtor must have a beneficial interest in the property. Where the debtor has only a naked legal title in trust for others, he has no interest in the property that may be seized and sold under execution,* no matter how completely he may have exercised apparent ownership over it, unless credit was given him on the faith of such ownership."

In the light of the concluding language of the foregoing quoted matter it should be noted again that, at the time the indebtedness here was incurred (now merged in judgment) the Appellee, as alleged in the complaint of intervention:

> "Well knew that the said Teton Co-Operative Reservoir Co. was the instrumentality and agency through and by which the Bynum Irrigation District supplied water for irrigation purposes to the lands in the said district and that the said district had no other means of supplying water to the same." (Tr. 68.)

Upon the same page of the transcript it is further alleged that the Appellee also then and there knew all the other facts and circumstances set forth and alleged in the complaint of intervention of the Appellants, Ackroyd, et al.

Controlling and leading cases that support the rule of the American Jurisprudence reference, supra, are as follows, to-wit:

Smith v. McCann, 24 How. 398, 16 L. Ed. 714;
Townsend v. Greeley, 5 Wall. 326, 18 L. Ed. 547.

In *Smith v. McCann,* supra, paragraph 5 of the syllabus of the law edition report reads as follows, to-wit:

> "It is not every legal interest that is made liable to sale on a fi.fa.; the debtor must have a beneficial interest in the property."

In the *Townsend* case, supra, certain lands were held in trust for the inhabitants of a municipality. The court said:

> "Trust property, thus held, is not the subject of seizure and sale under judgment and execution against the trustee, whether that trustee be a natural or an artificial person."

Other authorities to the same effect are as follows:

23 *C. J.,* Executions, Par. 83;
17 *R. C. L.,* Levy and Seizure, Par. 22, page 125;
Sapero v. Neiswender (C. C. A. 4), 23 Fed. (2d) 403 and 406;

Princeton Mining Co. v. The First Nat'l Bank of Butte, et al., 7 Mont. 530 and 539.

We have here, in Teton Co-Operative Reservoir Co., the type of corporation involved in *Pacific States Savings and Loan Corporation v. Schmitt, et al.* (C. C. A. 9), 103 Fed. (2d) 1002. The point presented here was not involved in the *Schmitt* case. But this court has pointed out in that case that such a corporation as Teton Co-Operative Reservoir Co. here acts "as the agent of its stockholders in the diversion and storage of water to be applied to beneficial use upon their lands". It acts in a fiduciary capacity. Thus, upon principle, the *Schmitt* case makes the doctrine of *Smith v. McCann,* and the other authorities, supra, applicable in the case at bar.

But a case directly in point is that of *Eldredge v. Mill Ditch Co. et al.* (Ore.), 177 Pac. 939. In that case Mill Ditch Co. was a corporation organized for the purpose of diverting water from the Malheur river and distributing it through its ditches to its stockholders in proportion to the shares of stock held by each stockholder. Each of those shares, as in the case at bar, represented the right to a certain amount of water. The U. S. National Bank had a judgment against Mill Ditch Co. It levied execution upon the property of that company, which included its water and ditch rights, and sold the same. Thereupon the Eldredge action was brought to set aside the execution sale and to bring about the levy of necessary assessments to pay the debts of the Ditch Company. The Oregon Court in the *Eldredge* case specifically applies

the rule that equity will not permit the levy of an execution upon a legal title held by a debtor as trustee for a third party, and says:

> "A court of equity would look to the interest of the real beneficiaries and would not permit them to be uselessly embarrassed by the sale of the legal title held by the debtor."

The court also points out in the *Eldredge* case that property which is so involved with the interest of the public that it cannot be levied upon and sold without interfering with the rights of the public is not subject to levy and sale under execution. The court says in this connection:

> "Such are the interests of corporations like canals and railroads, even when in some sense held by private corporations, and the interests held by a school district and other public and quasi public organizations."

The case of *Gue v. Tidewater Canal Co.*, 24 How. 257, 16 L. Ed. 635, is relied upon as a leading case to support the doctrine. There a judgment creditor of the canal company, a great thoroughfare of trade, caused an execution to be levied upon a house, a lot, a wharf and canal locks belonging to the canal company. A bill was filed on the equity side of the court to enjoin the execution sale, and the action of the lower court in granting a perpetual injunction was affirmed upon appeal.

After considering in the *Eldredge* case all of the foregoing principles the Oregon court then says:

"It seems that all of these questions enter more or less into this case, and all are reasons why the property of this mutual water company held and used for the purpose of transmitting and delivering water appropriated by them, and used upon their respective land, ought not to be permitted to be sold upon an execution against the water corporation.

It seems to be pretty well settled, in the states having water codes similar to that of our own state, even in cases of public service corporations organized for profit and selling water to the general public, that the water and ditch rights really belong to the individual appropriator and are appurtenant to the lands upon which the same are used, and that the corporation transmitting the same is in the nature of a holding company or agent for the true owners of the water rights. Weil on Water Rights (3d Ed.) vol. 2, Par. 1339, p. 1237, and authorities cited.

How much more so must this be true in the case of a mutual water company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of the water the quantity to which each is entitled. *The relation here on the part of the corporation seems to be clearly that of a holding company, trustee, or agent for the real owners of the water who are putting it to a beneficial use upon their lands. It would seem clearly that the corporation in such a case had no interest in the water or ditches which equity would permit it to sell and transfer to outside parties, and thereby*

deprive the water users of the same, and, if this could not be done by private contract, it certainly could not be done by an involuntary sale under execution.

The sale in question could work no useful purpose, but would practically destroy the entire property, and embarrass and hinder the owners of the water and perhaps prevent them from obtaining it, at all."

The judgment of the lower court, which sanctioned the execution sale against the Mill Ditch Co., was accordingly reversed. The concluding language of the court in the *Eldredge* case is pertinent:

"In this case it would be a calamity, to that portion of the public represented by the water users under the ditch, if such ditch could be closed and their water rights destroyed and transferred by such an execution sale; and the whole community would be more remotely affected, since they are dependent upon these (and others like them) for the production of the necessities of life. May it not well be that such water-serving corporations are as public in their purposes and as closely interwoven with the public interest as a small village or a school district on the one hand, or as a canal company considered in Gue v. Tide Canal Co., already cited; and therefore not subject to execution against their property?"

An application of the principle of the *Gue* case, cited in the *Eldredge* case, is found in *Northern Pacific Ry. Co. v. Schimmell,* 6 Mont. 161, 9 Pac. 889. There the court held that an office safe at a railroad

depot, in which the railroad agent deposited receipts of money and valuable papers, facilitates the operation of the railroad and cannot be seized on execution against the company because of the interest the public has in the continuance of the operation of the railroad.

The foregoing argument, and the controlling authorities considered and discussed therein, establish, without more, that the Appellee is without right to levy upon the real estate involved in the suit at bar.

III.

NEITHER LEVY UPON NOR SALE UNDER EXECUTION OF THE REAL ESTATE INVOLVED HERE MAY BE MADE BECAUSE OF ITS PUBLIC CHARACTER AND NECESSARY USE FOR PUBLIC PURPOSES.

The public character and public use of the real estate which the Appellee threatens to sell under execution has been established by argument, supra. Again we emphasize in this connection the following allegations of the complaint of intervention of the Appellants Ackroyd, et al., which have been admitted, viz.:

> "That the said capital stock of the said Teton Co-Operative Reservoir Co. so purchased, as aforesaid, constitutes and is the sole source of water supply for the said Bynum Irrigation District and is indispensable, in its entirety, to the conduct of the business of the said Bynum Irrigation District as a public corporation of the State of Montana." (Tr. 55 and 56.)
>
> "That in the conduct of its business the said company (meaning Teton Co-Operative Reservoir

Co.) has acquired and now owns and holds real estate in Teton County, Montana; that it has constructed improvements thereon consisting of the said reservoir, embankments for the same, dams, headgates, canals, and other necessary structures for the proper diversion, impounding and distribution of waters for irrigation purposes, and that all of the said real estate is needed by the said company for the conduct of its business; (Tr. 63.)

"That the said Winston Brothers Co. further claims the right, under the said judgment, to levy upon the said real estate by writ of execution and to cause the same to be sold at sheriff's sale and to deprive the said Teton Co-Operative Reservoir Co. and the said Bynum Irrigation District of the said property, all of which said property is indispensable * * * to the operation of the said Bynum Irrigation District as a public corporation and to the delivery of waters for irrigation purposes to the land in the said district."

It is the contention of the Appellants Ackroyd, et al. that the real estate involved here may not be sold under the judgment obtained by the Appellee because of its public character and public use, and this for two reasons, to-wit: *First,* the statutes of Montana do not authorize the sale under judgment of public property necessarily used for public purposes; and, *Second,* it is against public policy to allow such property to be sold under judgment and to thus disrupt the affairs of a public corporation or make it impossible to function

as such. These two contentions will be discussed together under this subdivision of the argument.

Section 9410, Revised Codes of Montana, 1935, provides that after a judgment has been docketed:

> "It becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied."

The execution statute is Section 9416, Revised Codes of Montana, which provides that the party in whose favor a judgment was given may at any time within six years after the entry thereof have a writ of execution issued for its enforcement.

It is upon these statutes that the Appellee relies not only for a lien upon the real estate involved but to support its claim that the said real estate may be sold under execution. Neither statute, it will be noted, nor any other Montana statute, provides that the judgment lien attaches to public property necessarily used for public purposes or that such property may be sold in satisfaction of a judgment. The said statutes, and all appurtenant statutes, are general statutes, and no intention has been manifested thereby, either in express language or by implication, that public property necessarily used for public purposes shall be comprehended by the statutes.

It is a general rule of law as declared in 59 *Corpus Juris,* Statutes, Par. 653, page 1103, that:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication."

And in 19 *R. C. L.,* Municipal Corporations, Par. 339, the rule is stated to be:

"It is well settled that when a creditor has secured judgment against a municipal corporation, and taken out execution, he cannot levy upon property of the corporation which is devoted to public uses * * *. This rule is based upon obvious principles of public policy, and is not a peculiar or special privilege of municipal corporations."

In 5 *American & English Annotated Cases,* Note, Page 512, it is said:

"According to the weight of authority, the general rule is that property of a quasi-public corporation, essential to the discharge of those public duties for which it is created, is not subject to levy and sale on execution in the absence of statutory provisions to that effect."

Other general authorities to the same effect as above are as follows, to-wit:

McQuillin Municipal Corporations, Vol. 3, Par. 1160, and Vol. 5, Par. 2500;

17 *R. C. L.,* Levy and Seizure, Par. 43;

23 *Corpus Juris,* Executions, Par. 105;

59 *Corpus Juris,* Statutes, Par. 653;
Lewis' Sutherland Statutory Construction, 2nd Ed., Vol. 2, Par. 514;
21 *Am. Jur.,* Executions, Par. 457.

The remedy to be applied by the Appellee here is pointed out in *U. S. ex rel. Masslich v. Saunders, et al.* (C. C. A. 8), 124 Fed. 124 and 126, where the court says:

> "In the enforcement of judgments of the national courts against municipal and quasi municipal corporations, the writ of mandamus is the legal substitute for the writ of execution to enforce judgments against private parties. The plaintiff in a judgment of the former class has the same right to the issue and enforcement of a mandamus commanding the proper officers of the defendant corporation to make suitable provision for its payment that the plaintiff in a judgment of the latter class has to the issue and enforcement of a writ of execution."

In the controlling case of *Walkley v. City of Muscatine,* 6 Wall. 481, 18 L. Ed. 930, the court held that where a judgment against a city was not paid the appropriate remedy was by writ of mandamus.

Some of the general principles here involved were settled by this court in *California Iron Yards Co. v. Commissioner of Internal Revenue* (C. C. A. 9), 47 Fed. (2d) 514.

A controlling case also that settles *all* of the principles invoked by the Appellants, Ackroyd, et al. is

that of *Whiteside v. School District No. 5, et al.,* 20 Mont. 44, 49 Pac. 445. There Judge Hunt, later a member of this court, held, as declared by Par. 1 of the syllabus in the Montana Report, that:

> "Inasmuch as the law which provides for liens of mechanics does not expressly provide for a lien upon school and other buildings such buildings are not subject to the lien of a subcontractor."

We quote from the decision as follows, to-wit:

> "Most of the decisions base their reasoning upon the ground of public policy, and point out that it is easy to see what detriment might follow if lands and buildings held for public uses—as, for instance, common schools—could be sold to satisfy the debts or defaults of municipal corporations having the legal title.
>
> In the California case cited above the court invoked the general doctrine that 'the state is not bound by general words in a statute which would operate to trench upon its sovereign rights injuriously affecting its capacity to perform its functions or establish a right of action against it', and the court applied the familiar rule of construction heretofore cited by holding that *by the omission in the statute to mention public buildings it was manifest from the whole statute of that state that they were not included.*
>
> We believe that under the statute of this state, construing it according to the rule laid down in the foregoing cases, it was not intended to give to a mechanic who is a sub-contractor a lien for work done or materials furnished in the construc-

> tion of a public school house. The omission of the express right to a lien upon such a building and property shows that it was not intended to be included within the provisions of the law for reasons of public policy. It is evident that the legislature did not mean to disturb this almost universal rule of statutory construction."

The *Whiteside* case, supra, and the principles settled thereby were not considered by the lower court in its decision. (Tr. 84 and 85.) It is the contention of the Appellants Ackroyd, et al. that the *Whiteside* case, without more, is controlling and decisive here. The rule of that case has not been departed from in Montana in any subsequent decision.

In *State v. Blake* (Utah), 20 Pac. (2d) 871, the court held that the property of a drainage district may not legally be taken from the district under writ of execution, but that the remedy is by mandamus.

In *People v. San Joaquin Valley Agricultural Assn., et al.* (Cal.), 91 Pac. 740, the court held that an agricultural association organized for the purpose of holding products of a certain territory of the state is a public corporation created for the local administration of the affairs of the state and that its property is not subject to execution although the statute creating the association authorizes it to sue and be sued.

In *Sherman County Irr. & Water Power & Improvement Co. v. Drake, et al.* (Neb.), 91 N. W. 512, the company was a quasi-public corporation organized

to construct a work of internal improvement, namely, a canal for irrigating and power purposes. Drake recovered a judgment at law against the company and levied an execution upon the flume and part of the right-of-way of the company, whereupon an action was brought to perpetually restrain the enforcement of the execution levy. The court held "in accordance with the general voice of judicial authorities", namely:

> "In the absence of statutory enactment, the property of quasi public corporations, like the plaintiff, cannot be seized and sold upon process in actions at law."

As stated previously herein the case at bar is not one in which the Appellants Ackroyd, et al. claim *exemption* from execution of the real estate involved. On the contrary their claim is that no authority of law can be found in any statute of Montana for either a lien upon such public property by judgment or for a sale thereof under execution.

CONCLUSION.

Regardless of the form the transaction has taken it is plain that the investment by Bynum Irrigation District in the stock of Teton Co-Operative Reservoir Co. was for the sole purpose of obtaining a water supply that was actually needed by the district for purposes of irrigation. It acquired such water supply, that was so necessary to enable it to operate as a public corpo-

ration, when it took over, in effect, Teton Co-Operative Reservoir Co., and, through ownership of 80.4% of the capital stock of that Company, put the district, through its district commissioners, in a position to control the works of irrigation of the said Company and the distribution of water.

A court of equity will hardly give serious consideration to a claim that, under such circumstances, the property held by Teton Co-Operative Reservoir Co. and necessarily used as part of the irrigation system, can be levied upon under judgment and sold under execution as the property of an ordinary debtor and Bynum Irrigation District be thus deprived of its sole source of water supply so that it can no longer function as a public corporation. "Equity regards substance rather than form." And such a claim should be particularly obnoxious in a court of equity, that requires those who enter its portals to come with clean hands, when consideration is given to the fact that the Appellee, who has made such claim heretofore, knew, from the first, the status of Teton Co-Operative Reservoir Co. and its exact relation to Bynum Irrigation District. Thus the Appellee also knew, for it was charged with knowledge of the law, that claims and demands cannot be enforced, by lien or levy, against public property necessarily used in the conduct of the business of a public corporation.

The lower court plainly erred in granting the motion to dismiss and in rendering judgment accordingly. That judgment should be reversed with direc-

tions to enter judgment for the Appellants as prayed for in their bills.

Dated, Billings, Montana,
September 27, 1939.

Respectfully submitted,
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No. 9251

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS, and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROS. COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROS. COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT

BRADY IRRIGATION COMPANY

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Filed..... 1939.

....., Clerk.

CONSTITUTIONAL PROVISIONS

RULES

STATUTES

TEXT BOOKS

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BRIEF OF APPELLANT

BRADY IRRIGATION COMPANY

Upon Appeal from the District Court of the United States, for the District of Montana.

STATEMENT OF JURISDICTIONAL FACTS

This is an appeal from a final Judgment of Dismissal on a Motion to dismiss the Complaint and Petition for Declaratory Judgment based on the ground that the Complaint and Petition for Declaratory Judgment does not state facts sufficient to constitute a cause of action. (R. p. 94.)

In the Complaint it is alleged: That this is a suit of a civil nature and is a case of actual controversy, and that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. (R. p. 3, par. 2.)

That the plaintiff during all the times mentioned in the Complaint was a corporation organized under and by virtue of the laws of the State of Montana and is a resident and citizen of the State of Montana. (R. p. 4, par. 5.) That the defendant, Winston Bros. Company, during all the times mentioned in the Complaint, was and now is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and is a resident and citizen of the State of Minnesota. (R. p. 3, par. 1.) That the defendant, Bynum Irrigation District, is a public corporation of the State of Montana and a resident and citizen of the State of Montana. (R. p. 4, par. 3.) That the defendant, Teton Cooperative Reservoir Company, is a corporation organized and existing under and by virtue of the laws of the State of Montana, and is a citizen of and resident of the State of Montana. (R. p. 7, par. 6.) That the plaintiff did, in writing, request and demand that the defendants, Teton Cooperative Reservoir Company and Bynum Irrigation

District, join the plaintiff as parties plaintiff in the action but that each refused and still refuses to join the plaintiff as a party plaintiff, for the purpose of litigating the controversy set forth in the Complaint. (R. p. 4, par. 3.)

The District Court had jurisdiction of the action on the ground of diversity of citizenship between the plaintiff and the defendant, Winston Bros. Company. (28 USCA 41, Subdiv. (b) Sec. (1)). It is alleged in the Complaint that this is a suit in equity of a civil nature and is a case of actual controversy. (R. p. 3, par. 2.) The allegations of the Complaint and Petition for a Declaratory Judgment are to the effect that the defendant, Winston Bros. Company, had obtained a Judgment against the Teton Cooperative Reservoir Company and claimed a lien against the lands and premises of the Teton Cooperative Reservoir Company which were necessary and are being used for irrigation purposes to irrigate the lands of the stockholders of the plaintiff corporation, and the lands of persons claiming rights to water from the Teton Cooperative Reservoir Company by reason of the ownership of stock in the Teton Cooperative Reservoir Company. It is alleged that all of the property in question is appurtenant to the lands irrigated by means of the water stored on the lands of the Teton Cooperative Reservoir Company, and used for the diversion of the same to the place of use. It is further alleged that the defendant, Winston Bros. Company, claims a lien against the lands of the Teton Cooperative Reservoir Company used for irrigation purposes, and has threatened to and will, unless restrained by an Order

of the Court, obtain a Writ of Execution for the purpose of selling the land under and by virtue of such Writ of Execution. In its prayer, the plaintiff prays that the Court declare the rights of the plaintiff in and to the lands of the Teton Cooperative Reservoir Company, under the Declaratory Judgment Act of the United States of America and to declare that the Winston Bros. Company has no lien against said lands but that the plaintiff and its stockholders have the right to take 156/1000 part of the waters of the reservoir located on the lands in question, free and clear from any lien of the Judgment of said Winston Bros. Company. (R. pp. 3-24.) The Complaint of the plaintiff was filed in the office of the Clerk of the District Court on July 21, 1937. (R. p. 24.)

Since the Complaint was filed, the Federal Rules of Civil Procedure have been adopted. Rule 57 provides that the procedure for obtaining a Declaratory Judgment shall be in accordance with these rules and that the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

This case presents an actual controversy, as to whether or not Winston Bros. Company could, unless restrained by this Court, obtain a Writ of Execution and proceed to sell the property of Teton Cooperative Reservoir Company. Therefore, the District Court had jurisdiction to declare the rights of the parties under the Declaratory Judgment Act of the United States. (28 USCA 400.)

It is alleged in the Complaint that unless the Judgment in favor of Winston Bros. Company against Teton Co-

operative Reservoir Company is adjudged not to be a lien against the reservoir site and irrigation facilities of the Teton Cooperative Reservoir Company, the Judgment will be and remain a cloud upon the title upon the property in question, to the irreparable damage and injury of the plaintiff and its stockholders: (R. p. 17, par. 16.) The property in question is located in the District of Montana. Therefore, the District Court had jurisdiction to remove the cloud cast by the Judgment. (28 USCA 118.)

JURISDICTION OF THIS COURT

Judgment in the instant case was rendered and filed on the 14th day of April, 1939. (R. p. 94.) The Notice of Appeal of this Court was filed on July 11, 1939, (R. p. 98) and on July 11, 1939, an Undertaking on Appeal was filed with the Clerk of the District Court. (R. pp. 98-100.)This Court has jurisdiction of the appeal for the reason that the Judgment of the District Court is a final decision within the meaning of Subdivision (a), 28 USCA 225. The appeal was taken by filing of the Notice of Appeal with the Clerk of the District Court within three (3) months from the date of the entry of the Judgment (Rule 73 of the Federal Rules of Civil Procedure), and was therefore within the time prescribed in 28 USCA 230. The record on appeal was docketed in the office of the Clerk of this Court on July 31, 1939, and was therefore docketed within the time prescribed in Subdivision (g) of Rule 73, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The appellant, Brady Irrigation Company, filed its Complaint and Petition for a Declaratory Judgment. (R. pp. 3-24.) The appellee, Winston Bros. Company, interposed a Motion to dismiss the Complaint and Petition for Declaratory Judgment on the ground that the same does not state facts sufficient to constitute a cause of action. (R. p. 25.) The Motion to dismiss the Complaint and Petition for Declaratory Judgment was submitted to the Court on Briefs and a decision of the Court was rendered sustaining the Motion to dismiss. (R. pp. 78-92.) Thereafter, a Judgment of Dismissal was rendered by the Court. (R. p. 94.)

In addition to the allegations of the Complaint and Petition for a Declaratory Judgment showing the jurisdiction of the District Court, it is alleged:

That Teton Cooperative Reservoir Company is a corporation with a capital stock of 1000 shares, and ever since its organization has been operated only for the purpose of delivering water for irrigation and domestic purposes to its stockholders. It has at no time operated for profit and its only income has been from assessments levied against its outstanding capital stock, and the sale of such capital stock. Its income from these sources has been used solely for the purpose of maintaining, constructing and repairing certain irrigation facilities, consisting of a reservoir, ditches and canals.

The Teton Cooperative Reservoir Company in 1918 adopted a By-Law to the effect that each share of its capital stock "entitles the holder thereof to the use dur-

ing the irrigation season each year, of a 1/1000 part of the waters, water rights and irrigating facilities and systems of this Company." That the Teton Cooperative Reservoir Company is the owner of approximately 577.81 acres of land and is also entitled to the possession of lands on the public domain of approximately 3387.19 acres, which are used for reservoir purposes. On this land the Teton Cooperative Reservoir Company has constructed dams, reservoirs, ditches, canals and other works for the sole purpose of storing and supplying water to its stockholders. The water carried, stored and distributed by means of these irrigation facilities is used for irrigation and domestic purposes by its stockholders and the stockholders of the plaintiff corporation. (R. pp. 7-11.)

That all of the lands of the Teton Cooperative Reservoir Company are necessary and are being used for the purpose of carrying and storing waters for the irrigation of the lands within the Bynum Irrigation District, which is one of the stockholders of the Teton Cooperative Reservoir Company, and the lands of the stockholders of the plaintiff, and a few other stockholders. (R. par. 15, pp. 16-17.) All of the water stored in the reservoir of the Teton Cooperative Reservoir Company is necessary for the irrigation of lands within the Bynum Irrigation District and the lands belonging to the stockholders of the plaintiff, and other stockholders of the Teton Cooperative Reservoir Company. (R. pp. 18-19, par. 20.)

That the plaintiff at all times mentioned in the Complaint was a corporation organized and operating only for the purpose of delivering water for irrigation and

domestic purposes to its stockholders, and has been operated as a cooperative association and not for profit. No dividends have been paid by the plaintiff corporation to its stockholders, or earned, and its only income is obtained from assessments levied against its capital stock, consisting of 500 shares. All the proceeds of the sale of this capital stock and the assessments have been devoted solely for the construction and maintenance of irrigation facilities and the purchase of stock from the Teton Cooperative Reservoir Company. Each share of the capital stock of the plaintiff corporation entitles the owner thereof to 1/500 part of the waters appropriated and diverted by the plaintiff corporation. That the plaintiff is the owner of 156 shares of stock of the Teton Cooperative Reservoir Company and is entitled to 156/1000 part of the waters of the Teton Cooperative Reservoir Company, delivered to the plaintiff at the headgate of the reservoir belonging to the Teton Cooperative Reservoir Company. All of the capital stock of the plaintiff, consisting of 500 shares, have been issued and are outstanding. (R. par. 5, p. 4 to p. 8.) That the plaintiff has agreed and is under legal obligation to supply its stockholders the proportionate share of the waters from the reservoir of the Teton Cooperative Reservoir Company to which it is entitled, under and by virtue of the ownership of 156 shares of the stock of the Reservoir Company, and if the lands and other property of the Teton Cooperative Reservoir Company are sold under a Writ of Execution which may be obtained by the defendant, Winston Bros. Company, then the plaintiff will be deprived of its ability

to deliver water for irrigation and domestic purposes to its stockholders and thus breach its agreement with its stockholders and thus breach its agreement with its stockholders. That the property of the Teton Cooperative Reservoir Company on which the irrigation facilities are located, is appurtenant to the lands of the stockholders of the plaintiff, and the lands within the Bynum Irrigation District, and others owning stock of the Teton Cooperative Reservoir Company. (R. par. 14, p. 15, to par. 16, p. 17.) That the reservoir constructed on the lands of the Teton Cooperative Reservoir Company is necessary for the purpose of storing water for irrigation purposes by the stockholders of the plaintiff, the lands within the Bynum Irrigation District, and the lands of other stockholders of the Teton Cooperative Reservoir Company, and this land and this reservoir has always been used for this purpose. The 500 shares of the capital stock of the plaintiff corporation are now held by owners of approximately 10,000 acres of land in Pondera County, Montana, which is being irrigated from the waters of the reservoir in question. (R. p. 17, par. 17 to p. 18, par. 20.)

It is alleged in the Complaint that Bynum Irrigation District is a public corporation of the State of Montana organized and existing and operating as an irrigation district, under and by virtue of Chapter 146 of the Laws of 1909 of the State of Montana, and the amendments thereto. (R. par. 4, p. 4.) During the year 1925, Bynum Irrigation District became the owner of 804 shares of the capital stock of the Teton Cooperative Reservoir Company, and ever since has been the owner of the same.

(R. p. 11, par. 10.) Prior to the acquisition of this stock of the Teton Cooperative Reservoir Company, the Bynum Irrigation District was without water with which to irrigate the lands within the District and the stock of the Teton Cooperative Reservoir Company was obtained for the sole purpose of providing water for the irrigation of the lands within the Bynum Irrigation District. (R. pp. 11-12, par. 11.)

The defendant, Winston Bros. Company, obtained a judgment in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Teton, against Teton Cooperative Reservoir Company, in the sum of $29,596.53. This judgment was obtained for certain work done by Winston Bros. Company in enlarging the reservoir used for irrigation purposes and located on the lands of the Teton Cooperative Reservoir Company. It is alleged in the Complaint that when this construction work was done by the Winston Bros. Company, the Company and its officers knew that the By-Laws of the Teton Cooperative Reservoir Company provided that each share of the capital stock of the Teton Cooperative Reservoir Company entitled the holder thereof to the use during the irrigation season of a 1/1000 part of the waters, water rights, irrigation facilities and systems of the Teton Cooperative Reservoir Company, and that said Winston Bros. Company and its officers knew that all of the lands on which the irrigation facilities are located were necessary for the irrigation purposes of the stockholders of the Teton Cooperative Reservoir Company. That ever since the judgment was rendered, and

for a long time prior thereto, the Bynum Irrigation District was a bankrupt, and hopelessly insolvent. (R. p. 12, par. 12 to p. 15, par. 13.)

It is alleged that the defendant, Winston Bros. Company, claims a lien against the lands, reservoir sites, reservoir and premises owned by the Teton Cooperative Reservoir Company, and unless restrained by an Order of this Court, will apply for and obtain a Writ of Execution from the Clerk of the Court in which the judgment was rendered, and will cause the lands of the Teton Cooperative Reservoir Company, the reservoir site, and other property of the Company, to be sold under and by virtue of the Writ of Execution. (R. p. 15, par. 13.) That a sale of the land of the Teton Cooperative Reservoir Company would deprive the plaintiff of its ability to deliver water for irrigation and domestic purposes to its stockholders. (Par. 14, p. 15.) It is further alleged in the Complaint that the judgment in favor of Winston Bros. Company is not a lien against the property on which the irrigation facilities of the Teton Cooperative Reservoir Company are located, but that unless it is decreed by this Court that it is not a lien against the said property, the judgment will be and remain a cloud upon the title of the property and cause irreparable damages to the plaintiff and its stockholders. (R. pp. 16-17, par. 15-16.) The plaintiff, in the prayer of its complaint, prays for a restraining order to restrain the defendant Winston Bros. Company, from causing the property of the Teton Cooperative Reservoir Company from being sold under a Writ of Execution, and for a Declaratory Judgment to

the effect that the property of the Teton Cooperative Reservoir Company necessary for irrigation purposes is not subject to a lien, by reason of this Judgment, and cannot be sold under and by virtue of any Writ of Execution issued on said judgment, and that the Court declare that the Brady Irrigation Company and its stockholders have the right to take 156/1000 part of all of the waters of the reservoir located on the land of the Teton Cooperative Reservoir Company.

SPECIFICATION OF ERRORS

The Court erred in the following respects:

I.

In granting the Motion of the defendant, Winston Bros. Company to dismiss the plaintiff's Complaint and Petition for Declaratory Judgment.

II.

In rendering Judgment dismissing the plaintiff's Complaint and Petition for a Declaratory Judgment.

III.

In holding that the Complaint did not state facts sufficient to entitle the plaintiff to a Judgment declaring the rights and easements of the plaintiff by reason of its ownership of 156 shares of the capital stock of the Teton Cooperative Reservoir Company in and to the property used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

IV.

In holding that the Complaint of the plaintiff did not

state facts sufficient to constitute a cause of action in favor of the plaintiff, for a Declaratory Judgment declaring that the plaintiff has an easement in and to the lands necessary for irrigation purposes, the title to which is held by Teton Cooperative Reservoir Company.

V.

In holding that the Judgment of the defendant, Winston Bros. Company, a corporation, is a lien enforceable by Writ of Execution and sale against the property which is necessary and is used for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company.

VI.

In failing to hold that the appellant, Brady Irrigation Company, was not entitled to a Judgment declaring that any lien which the appellee, Winston Bros. Company, a corporation, may have against the land described in the Complaint and held by Teton Cooperative Reservoir Company, is subject to an easement of the appellant, Brady Irrigation Company, for the purpose of diverting, storing and carrying water for irrigation puposes on and across said land.

VII.

In holding that the lands necessary for irrigation purposes, the legal title to which is held by Teton Cooperative Reservoir Company, are not appurtenant to the lands of the stockholders of the appellant, Brady Irrigation Company, irrigated with waters diverted, impounded and stored by means of the irrigation works on said lands

under the supervision of Teton Cooperative Reservoir Company.

VIII.

In holding that the Complaint of the plaintiff did not state facts sufficient to constitute a cause of action for an injunction restraining a sale under a Writ of Execution of the property described in the Complaint which is necessary and used for irrigation purposes, the legal title to which stands in the name of Teton Cooperative Reservoir Company.

SUMMARY OF ARGUMENT

The Property of the Reservoir Company is Appurtenant to the Land Irrigated.

The By-Laws of Teton Cooperative Reservoir Company and appellant, entitling their stockholders to the use during the irrigation season, of their proportionate share of the water rights and irrigation facilities of the Reservoir Company, are enforceable contracts. Hyink vs. Low Line Irrigation Co., 62 Mont. 401; 205 Pac. 236; Dyk, et al vs. Buell Land Company, et al, 70 Mont. 557; 227 Pac. 71; Miller vs. Imperial Water Company, 156 Cal. 27; 103 Pac. 227, 24 LRA (N. S.) 372; Brady Irrigation Co. vs. Teton County, et al, 107 Mont. 330; 85 Pac. (2d) 350.

The issuance of shares of stock constitute grants of the right to the use of water and the irrigation facilities of the Reservoir Company. Pacific States Savings and Loan Corporation vs. Schmitt, et al, 103 Fed. (2d) 1002; Adamson vs. Black Rock Power & Irrigation Co., (9

Cir.) 297 Fed. 905; Allen, et al, vs. Railroad Commission of California, 179 Cal. 68, 175 Pac. 466; 67 C. J. 1410, Sec. 1080.

The method of obtaining water for the Bynum Irrigation District by the purchase of stock entitling the Irrigation District to its proportionate share of the water rights and irrigation facilities of the Reservoir Company, was authorized by the laws of the State of Montana and therefore, the water rights and irrigation facilities of the Reservoir Company are, by the force of the decision of the Supreme Court of the State of Montana and statutory law pertaining to irrigation districts, appurtenant to the lands irrigated within the district. Thaanum vs. Bynum Irrigation District, et al, 72 Mont. 221; 232 Pac. 528; 7174 Rev. Codes of Mont. 1935; 7202 Rev. Codes of Mont. 1935; 6671 Rev. Codes of Mont. 1935; Brady Irrigation Company vs. Teton County, et al, 107 Mont. 330; 85 Pac. (2d) 350; Yellowstone Valley Co. vs. Associated Mortgage Investors, 88 Mont. 73; 290 Pac. 255; Pacific States Savings and Loan Corporation vs. Schmitt, et al, 103 Fed. (2d) 1002.

The Property of the Reservoir Company is Not Subject to a Lien by Reason of the Judgment of Appellee.

The aggregate value of the rights of the stockholders in and to the property of the Reservoir Company is the total value of such property, the shares of the stockholders being the muniments of title to the water rights and irrigation facilities. Pacific States Savings and Loan Corporation vs. Schmitt, et al, 103 Fed. (2d) 1002; Brady Irrigation Company vs. Teton County, et al, 107 Mont.

330; 85 Pac. (2d) 350. Therefore, a sale of property of the Reservoir Company would not defeat the easements of the landowners entitled to the use of water rights and irrigation facilities of the Reservoir Company. Chumasero vs. Viall, 3 Mont. 376; MacGinniss Realty Co. vs. Hinerager, 63 Mont. 172; 206 Pac. 436; Fox vs. Curry, 96 Mont. 212; 29 Pac. (2d) 663.

The Reservoir Company is the holder of the bare, naked legal title to the property used for irrigation purposes. Osterman vs. Baldwin, 73 U. S. 90, 18 L. Ed. 730; Story vs. Black, 5 Mont. 26; 1 Pac. 5; Princeton Mining Co. vs. First National Bank of Butte, et al, 7 Mont. 530; 19 Pac. 210. An attempted sale of the property of the Reservoir Company would therefore be restrained by a court of equity, since it would destroy the property rights of its stockholders without benefitting the judgment creditors, except perhaps in a very minor degree. Sec. 15, Article 3, Constitution of Montana; Gue vs. The Tidewater Canal Company, 65 U. S. 228, 16 L. Ed. 635; Eldridge vs. Mill Ditch Co., 90 Ore. 590, 177 Pac. 939.

The Complaint States a Cause of Action to Remove a Cloud on Title.

28 USCA 118; Dick vs. Foraker, 155 U. S. 404; 39 L. Ed. 201; Johnson vs. North Star Lumber Company, 206 Fed. 624; Louisville, etc. Railway Co. vs. Western Union Telegraph Co., 234 U. S. 369; 58 L. Ed. 1356; Thompson vs. Emmett Irrigation Dist., (9 Cir.) 227 Fed. 560.

The Complaint States a Cause of Action for a Declaratory Judgment.

28 USCA 400; Gully vs. Interstate Natural Gas. Co., Inc., (5 Cir.) 82 Fed. (2d) 145; Nashville C. & Stlr. Co. vs. Wallace, 288 U. S. 249; 53 S. Ct. 345; 77 L. Ed. 730; 87 A. L. R. 1191; U. S. vs. West Virginia, 295 U. S. 463; 55 S. Ct. 789; 79 L. Ed. 1546.

Appellant derived no benefits from the indebtedness for which the judgment was rendered and therefore should not be deprived of its rights in the property of the Reservoir Company.

ARGUMENT

The Property of Reservoir Company is Appurtenant to the Land Irrigated.

The principal question for decision by this appeal is whether or not the Complaint and Petition for Declaratory Judgment of the plaintiff states facts sufficient to constitute a cause of action under any theory. If it does, the motion to dismiss should have been denied. Since all of the Specifications of Error relate to the question as to whether or not the Motion should have been granted, we will dispose of all of the Specifications of Error by grouping them for the purpose of argument.

Neither the plaintiff nor the Teton Cooperative Reservoir Company have ever been operated for profit. Each corporation, by a By-Law, defined the rights of its stockholders as to the amount of water for irrigation purposes

to which each share of stock entitled a stockholder. The By-Law of the Reservoir Company set forth in full in the Complaint of the plaintiff (R. p. 8) provides that each share of its capital stock entitles the holder thereof to the use, during the irrigating season, of each year "of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this Company." The By-Law of the appellant corporation provides that each share of its capital stock represents and controls 1/500 part of all the waters appropriated and diverted by the corporation, and the owner of record of any share is entitled to the use of said proportion of said waters of the corporation. (R. p. 6.) These By-Laws are enforceable contracts.

Hyink vs. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236; Dyk, et al, vs. Buell Land Company, et al, 70 Mont. 557, 227 Pac. 71; Miller vs. Imperial Water Company, 156 Cal. 27, 103 Pac. 227, 24 LRA (N. S.) 372; Brady Irrigation Co. vs. Teton County, et al, 107 Mont. 330, 85 Pac. (2d) 350.

In a very similar case, Mr. Circuit Judge Healy of this Court, in Pacific States Savings & Loan Corporation vs. Schmitt, et al, (103 Fed. (2d) 1002) very aptly said:

> "If we disregard nomenclature and the formal recital of powers possessed but never asserted or exercised, there is nothing in the history or situation of any of these corporations to differentiate them from the mutual non-profit irrigation companies so familiar in the

arid states. In substance, the shares are mere muniments of title to rights in available water and to proportionate interests in the irrigation systems operated by the corporations as agents of their shareholders. Prosole v. Steamboat Canal Co., 37 Nev. 154, 140 P. 720, 144 P. 744. Compare In Re Thomas' Estate, 147 Cal. 236, 81 P. 539."

Therefore, when the Reservoir Company issued a share of its stock, it entered into a contract whereby the holder of such share is entitled to a 1/1000 part of the waters, water rights and irrigating facilities and systems of the Company. The irrigating facilities and systems mentioned in the By-Law must include all canals, ditches, reservoirs, dams and other works used for the purpose of diverting, storing and delivering water. It is alleged in the Complaint that all of the property, which consists of 577.81 acres (R. p. 9), is necessary to be occupied by a reservoir, canals, ditches, headgates and other improvements which are necessary for the conveyance, storage and distribution of irrigation water from the reservoir. (R. p. 17, par. 17.)

The contract entered into with the Reservoir Company and the stockholder upon the purchase of each share of stock, granted such stockholder the perpetual right to the use of 1/1000 part of the waters, water rights, irrigating facilities and systems of the Company. In Adamson vs. Black Rock Power & Irrigation Co. (9 Cir.), 297 Fed. 905, Mr. District Judge Bourquin, speaking for this Court, said:

"The sale of the perpetual use of a thing is a sale of the thing, whatever ground rent or other charge be

reserved. That is true of the right to the use of water as of aught else. Appellant's deeds are of land, "with the perpetual right to the use of water from the main canal," "the water right, . . . not personal property, but is appurtenant to the land," and "transferable only with the land." It is true a sale and delivery of water or of a water right may convey no right in, to, or upon source of supply or instrumentalities; but it is otherwise of a sale of perpetual water supply or permanent water right from a canal, or sale of land with appurtenant water right and service. These latter impress the source and instrumentalities in the power of the grantor and necessary to enjoyment of the water with a servitude or easement of which the grantee cannot be deprived without his consent."

In Allen, et al, vs. Railroad Commission of California, 179 Cal. 68, 175 Pac. 466, Mr. Justice Shaw, speaking for the Supreme Court of California, said:

"There is no ground for the claim that the water distributing system used by the water company can be considered as a thing separate from the right to receive water and declared to be a separate and public service, the rates for which, as to these petitioners, can be fixed by the Railroad Commission, and made to exceed the rates specified in the water certificates. The distributing system is a species of real property. Stanislaus W. Co. v. Bachman, 152 Cal. 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359. The right of a landowner to receive water not devoted to public use upon land for its benefit, from an outside source, through a system of canals or pipes for conducting it to the land, is an easement attached to the land and a corresponding servitude upon the source of supply and the distributing system. Copeland v. Fair View Co., 165 Cal. 154, 131 Pac. 119; Palermo Co. v. Railroad Commission, 173 Cal. 386, 160 Pac. 228. The easement and the servitude constitute a single entity and the one cannot be separated from the other without destroying both. The petitioners have property

interests in the distributing system by reason of these easements and servitudes. The contract fixed the rate, not only for the water as such, but also for its delivery; that is, for the use of the system for that purpose. To raise the rate without consent of the landowner would impair the obligation of the contract, and, so far as the increase inured to the benefit of the public use of other water through the same system, it would be taking the private property of these petitioners for public use without compensation."

In 67 C. J. 1410, Sec. 1080, the rule is stated as follows:

"A distributor of water for irrigation purposes may sell and convey to a consumer a water right, entitling him to receive a certain quantity of water from its system, and a purchaser or mortgagee of the irrigation system, or of the part thereof from which such consumer has the right to water, with knowledge of the previous grant, will be bound by the grantor's covenants. A conveyance of a permanent right to receive a certain quantity of water for irrigation may be made, which conveyance amounts to the conveyance of an easement in the ditch or system furnishing the water, and such water right becomes appurtenant to, and a part of, the land."

The Bynum Irrigation District, one of the joint owners of stock of the Reservoir Company, is a public corporation of the State of Montana, organized, existing and operating as an irrigation district under and by virtue of Chapter 146 of the Laws of 1909 of the State of Montana, and the amendments thereto. (R. p. 4, par. 4.)

The Bynum Irrigation District is the owner of 804 shares of the capital stock of the Reservoir Company, and this stock was purchased for the sole purpose of provid-

ing water for the irrigation of the lands within the irrigation district. (R. p. 12.) Sec. 7174, Revised Codes of Montana, 1935, as amended, defines the powers of the Board of Commissioners of an irrigation district, and Subdivision (3) of that section provides for obtaining water for irrigation purposes within the district as follows:

> "The board shall have power and authority to appropriate water in the name of the district, to acquire by purchase, lease, or contract, water and water rights; additional waters and supplies of water, canals, reservoirs, dams and other works already constructed, or in the course of construction, with the privilege, if desired, to contract with the owner, or owners of such canals, reservoirs, dams and other works so purchased and in the course of construction, for the completion thereof and shall also have power and authority to acquire by purchase, lease, contract, condemnation, or other legal means, lands (and rights in lands) for rights-of-way, for reservoirs, for the storage of needful waters, and for dam sites, and necessary appurtenances, and such other lands and property as may be necessary for the construction, use, maintenance, repair, improvement, enlargement and operation of any district system of irrigation works."

When the Bynum Irrigation District negotiated with the Reservoir Company for the purchase of stock, W. A. Thaanum, one of the owners of land within the District, objected to this method of obtaining water for irrigation purposes within the District and instituted suit in the State courts to obtain an injunction restraining the District and its commissioners from expending any money for the purpose of purchasing the stock in question. The Supreme Court of the State of Montana upheld the pur-

chase of stock in the Reservoir Company, as a means of obtaining water for irrigation purposes within the District. Thaanum vs. Bynum Irrigation District, et al, 72 Mont. 221, 232 Pac. 528. Section 7202, Revised Codes of Montana, 1935, which is part of the statutory law of Montana governing irrigation districts within the State, provides as follows:

> "The board of commissioners shall apportion the water for irrigation among the lands in the district in a just and equitable manner, and the maximum amount apportioned to any land shall be the amount that can be beneficially used on said land, and such amount of water shall become and shall be appurtenant to the land and inseparable from the same, but subject to reduction as hereinafter provided; provided, however, that any water owner of the district shall have the right to sell or assign for one season any of the water apportioned to him, and not required for use upon the land to which such water belongs; provided, all water, the right to the use of which is acquired by the district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the acts of congress, and rules and regulations of the secretary of the interior, and the provisions of said contract in relation thereto."

The foregoing section specifically provides that the amount of water apportioned to land within the District "shall be appurtenant to the land and inseparable from the same." When the Supreme Court of the State of Montana, in Thaanum vs. Bynum Irrigation District, approved the purchase of stock from the Reservoir Company as a means of obtaining water for irrigation purposes, it certainly must have, by implication, decided that when water for irrigation purposes was thus acquired

by the purchase of stock from the Reservoir Company, such water became appurtenant to the land within the District. If the water and the right to the use of the same, to which the Bynum Irrigation District is entitled, is appurtenant to the land irrigated by such water, then it must follow that the same is true with respect to the water obtained from the Reservoir Company by other stockholders of the last mentioned company.

Section 6671, Revised Codes of Montana, 1935, provides that:

> "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another."

The foregoing statute has on at least two occasions been applied by the Supreme Court of the State of Montana, where questions similar to those involved in this case were disposed of. In Brady Irrigation Company vs. Teton County, et al, 107 Mont. 330, 85 Pac. (2d) 350, the Court held that none of the property of the Teton Cooperative Reservoir Company was subject to taxation because the same was appurtenant to the land which was irrigated by means of the irrigation facilities located on the property of the Reservoir Company and therefore taxed when the irrigated land in question was taxed. Mr. Justice Anderson, speaking for the Court in that case said:

> "The owners of the stock in the Teton Cooperative Reservoir Company do not own the equitable title to the property of that corporation, but their relation to it is one of contract. (Hyink v. Low Line Irr. Co., 62

Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71.) These contracts give to the stockholder the right to receive, through the irrigation facilities of the Teton Company, his pro rata share of the water stored. The shareholder in the plaintiff company likewise has a contractual right to his pro rata share of the water received by that company. These rights, when used on certain lands, become appurtenant to such lands. (Sec. 6671, Rev. Codes.) *The aggregate value of all of these rights is the total value of the property owned by the Teton Company, and its property has no other use than the storing and distribution of water in performance of these contractual rights.*" (Italics ours.)

Mr. Chief Justice Callaway, in Yellowstone Valley Co. vs. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255, said:

"In Ireton v. Idaho Irr. Co., 30 Ida. 310, 164 Pac. 687, 689, we find the following: 'It is contended by appellant that the shares of stock in the operating company are personal property, and that the water right passed by assignment of them, and did not become subject to the mortgage on the land. While shares of stock in an ordinary corporation, organized for profit, are personal property (sec. 2747, Rev. Codes; State v. Dunlap, 28 Idaho, 784, and cases therein cited on page 802, 156 Pac. 1141 (Ann. Cas. 1918A, 546), and while this court has held shares in an irrigation company to be personal property (Watson v. Molden, 10 Idaho, 570, 79 Pac. 503) the fact must not be lost sight of that a water right is, as heretofore shown, real estate, and that in case of a mutual irrigation company, not organized for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water for use upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right . . . and own-

ership of them passes with the title which they evidence. (In re Thomas' Estate, 147 Cal. 236, 81 Pac. 539; Berg v. Yakima Valley Canal Co., 83 Wash. 451, L. R. A. 1915D, 292, 145 Pac. 619).' The doctrine announced in the foregoing cases is suited to our history and conditions and meets with our approval. Defendant's counsel cite decisions from the supreme court of Colorado to sustain the decision of the lower court, but with these we are unable to agree."

This Court, in Pac. States Savings & Loan Corp. vs. Schmitt, et al, 103 Fed. (2d) 1002, disposed of a situation similar to that presented in the instant case. Mr. Circuit Judge Healy, in that case said:

"It is a generally accepted principle in the arid states that shares in a non-profit irrigation company are appurtenant to the land of the shareholder irrigated through the system. They pass upon conveyance of the land and appurtenant water rights, although the stock may not be mentioned or the certificates formally transferred. In Re Thomas' Estate, supra; Ireton v. Idaho Irrigation Co., 30 Idaho 310, 164 Pac. 687; In Re Johnson's Estate, 64 Utah 114, 228 P. 748; Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 P. 255, 70 A. L. R. 1002; Burnett v. Taylor, 36 Wyo. 12, 252 P. 790; Twin Falls Land & Water Co. v. Twin Falls Canal Co., D. C., 7 F. Supp. 238, affirmed, 9 Cir., 79 F. 2d 431. The intimate legal relationship between land and water beneficially applied upon it, whether the water is directly appropriated or obtained through the intermediary of a canal company, finds ample recognition in Prosole v. Steamboat Canal Co., supra. We are satisfied that stock in irrigation companies should be held to have in Nevada the status usually accorded such property in other jurisdictions faced with similar problems."

Since all of the property of the Reservoir Company described in the Complaint is necessary for the purpose

of storing, diverting and carrying water for irrigation purposes to the lands of the Bynum Irrigation District, the stockholders of the appellant corporation, and other stockholders of the Reservoir Company, it follows that the persons entitled to the use of this water and the use of the irrigation facilities for irrigation purposes, have easements in all of the property of the Reservoir Company which are appurtenant to the lands irrigated with the water.

The Property of the Reservoir Company is Not Subject to a Lien by Reason of the Judgment.

In Pacific States Savings & Loan Corp. vs. Schmitt, 103 Fed. 1002, Mr. Circuit Judge Healy of this Court characterized corporations similar to the Teton Cooperative Reservoir Company and the Brady Irrigation Company "as agents of their shareholders" and stated that the shares are mere muniments of title to rights in available water and to proportionate interests in the irrigation systems operated by such corporation. In Brady Irrigation Company vs. Teton County, et al, 107 Mont. 330; 85 Pac. (2d) 350, Mr. Justice Anderson, speaking for the Supreme Court of Montana, in defining the respective interests of the stockholders of the Teton Cooperative Reservoir Company in and to the property held by the latter corporation, pointed out that the "aggregate value" of the rights of the stockholders is the "total value of the property owned by the" Reservoir Company. The Teton Cooperative Reservoir Company is therefore the owner of

a naked legal title burdened with the easements appurtenant to the lands irrigated by means of the irrigation system operated by the Reservoir Company.

If a sale under a Writ of Execution issued pursuant to the Judgment which the appellee, Winston Bros. Company has against the Reservoir Company, all that the purchaser at such sale would acquire is the right, title and interest of the Reservoir Company in and to the lands. The sale would not destroy the easements of the landowners who are entitled, through the ownership of the stock of the Reservoir Company, to the use of the irrigation works for the irrigation of their lands.

Chumasero vs. Viall, 3 Mont. 376; MacGinniss Realty Co. vs. Hinerager, 63 Mont. 172, 206 Pac. 436; Fox vs. Curry, 96 Mont. 212, 29 Pac. (2d) 663.

If the property described in the Complaint belonging to the Reservoir Company were sold under a Writ of Execution, surely no one would contend that the contractual rights entitling the owners of the shares of stock of the Reservoir Company to the use of the irrigation works and water, would be terminated. However, the stockholders of the Teton Cooperative Reservoir Company could not compel a purchaser at such execution sale to take the place of the Reservoir Company in the operation of the irrigation system. These stockholders would therefore find themselves in a position whereby they would have certain rights but no remedy whereby they could enforce such rights.

In Osterman vs. Baldwin, 73 U. S. 90, 18 L. Ed. 730, Mr. Justice Davis clearly pointed out that where a bare, naked legal title may be held by one person for the benefit of another, the purchaser at an execution sale obtains no title to the property, as follows:

> "If Holman had the bare, naked, legal title, without any beneficial interest in the property sold, and no possession, nothing passed by the sale. A purchaser, at a sheriff's sale, buys precisely the interest which the debtor has in the property sold, and takes subject to all outstanding equities."

In Story vs. Black, 5 Mont. 26, 1 Pac. 5, Mr. Chief Justice Wade, in pointing out that a court of equity will protect the equitable rights of third persons against a legal lien, said:

> "The purchaser at a sale of real property on execution acquires all the right, title, interest and claim of the judgment debtor therein (Code, sec. 329); but he acquires only such right and interest, and he takes the property subject to all the rights and equities of third parties which are capable of being enforced against the judgment debtor. 'The rule of caveat emptor applies to execution sales.' Chumasero v. Viall, 3 Mont. 379.
>
> Says Clifford, J., in Brown v. Pierce, 7 Wall. 218: "The correct statement of the rule is, that the lien of the judgment creates a preference over subsequently acquired rights, but in equity it does not attach the mere legal title to the land, as existing in the defendant at the time of its rendition, to the exclusion of a prior equitable title in a third person."
>
> "Guided by these considerations, the court of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered."

In Princeton Mining Co. vs. First National Bank of Butte, et al, 7 Mont. 530, 19 Pac. 210, Mr. Justice Bach, speaking for the Court, said:

> "And it is also a rule of law that where a judgment creditor attaches real estate of his judgment debtor, and that property is held by the said judgment debtor in trust, the judgment creditor (at least when purchasing with actual notice) obtains no right as against the cestui que trust of that property, even though the trust is no part of the records. See Osterman v. Baldwin, 6 Wall. 116; Brown v. Pierce, 7 Wall. 205; Chumasero v. Viall, 3 Mont. 376; Story v. Black, 5 Mont. 26."

If we grant that a sale under the Writ of Execution issued to Winston Bros. Company can be made of the property of the Teton Cooperative Reservoir Company which is necessary and used for the irrigation systems in question, the purchaser would acquire only such an interest in the property as the Reservoir Company has. The legal title of the Reservoir Company would be burdened with the easements in the property, which the stockholders of the Reservoir Company have. In other words, the purchaser at an execution sale would step into the shoes, so far as the ownership of the property is concerned, of the Reservoir Company, but such purchaser could not replace the Reservoir Company as a distributor of water because it could not be said that such purchaser would be compelled to assume the contractual obligations of the Reservoir Company incurred by the issuance of stock by the last mentioned company.

Section 15 of Article 3 of the Constitution of the State of Montana provides that:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."

Under and by virtue of the foregoing constitutional provision, the rights of the stockholders of the corporation to the use of the water and right of way over the lands of the Reservoir Company for all ditches, drains, flumes, canals and aqueducts is a public use. Whether the Reservoir Company is a public corporation or not, it is performing the functions of a public corporation by distributing the water used for irrigation purposes to its stockholders. If Winston Bros. Company were permitted to cause this property to be sold under and by virtue of a Writ of Execution, the corporate existence, so far as the stockholders of the Reservoir Company are concerned, would be terminated, since the effect of the contracts between the stockholders and the Reservoir Company would be destroyed. Under such circumstances, it is the general rule that courts of equity will intercede for the purpose of restraining a sale. This rule is very well illustrated in Gue vs. The Tidewater Canal Company, 65 U. S. 228, 16 L. Ed. 635, where Mr. Chief Justice Taney said:

"Upon the matters alleged in the bill and answer, several questions of much interest and importance have been raised by the respective parties and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, be-

cause, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would be against equity and unjust to the other creditors of the corporation, and to the corporators who own the stock, to suffer the property levied on to be sold under this fi. fa. and, consequently, the circuit court was right in granting the injunction.

The Tide Water Canal is a great thoroughfare of trade, through which a large portion of the products of the vast region of country bordering on the Susquehanna river usually passes, in order to reach tide water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of assembly which created the corporation. The property seized by the marshal is, of itself, of scarcely any value apart from the franchise of taking toll, with which it is connected, in the hands of the company, and if sold under this fieri facias without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties show it was not seized, and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks, and lots adjoining them."

Mr. Justice Bennett, in Eldridge vs. Mill Ditch Co., 90 Ore. 590, 177 Pac. 939, after quoting extensively from Gue vs. Tide Water Canal Co., said:

"It seems that all of these questions enter more or less into this case, and all are reasons why the property of this mutual water company held and used for the benefit of its stockholders alone and used for the purpose of transmitting and delivering water appropriated by them, and used upon their respective land, ought not to be permitted to be sold upon an execution against the water corporation.

It seems to be pretty well settled, in the states having water codes similar to that of our own state, even in cases of public service corporations organized for profit and selling water to the general public, that the water and ditch rights really belong to the individual appropriator and are appurtenant to the lands upon which the same are used, and that the corporation transmitting the same is in the nature of a holding company or agent for the true owners of the water rights. Weil on Water Rights (3d Ed.) vol. 2, para. 1339, p. 1237, and authorities cited.

How much more so must this be true in the case of a mutual water company, not organized for the purpose of selling water or as a profit corporation, but for the sole purpose of transmitting and delivering to the appropriators and owners of the water the quantity to which each is entitled. The relation hereon the part of the corporation seems to be clearly that of a holding company, trustee, or agent for the real owners of the water who are putting it to a beneficial use upon their lands. It would seem clearly that the corporation in such a case had no interest in the water or ditches which equity would permit it to sell and transfer to outside parties, and thereby deprive the water users of the same, and, if this could not be done by private contract, it certainly could not be done by an involuntary sale under execution.

> The sale in question could work no useful purpose, but would practically destroy the entire property, and embarrass and hinder the owners of the water and perhaps prevent them from obtaining it, at all."

The reasoning adopted by the courts in the foregoing cases, holding that equity will intervene and to prevent a sale of property in a case such as this, is applicable to the facts in the instant case, since a sale of the property of the Reservoir Company would result to destroy the irrigation facilities of the stockholders of the Reservoir Company, while a purchaser under a Writ of Execution would, most probably, realize scarcely anything for the irrigation works which would be utterly useless to such purchaser.

The Complaint States a Cause of Action to Remove Cloud on Title.

In the Complaint and Petition for Declaratory Judgment, appellant alleged that the judgment is in fact not a lien against the property on which the irrigation system is located, but that unless it be adjudged and decreed that said Judgment is not a lien, the same will be and remain a cloud upon the title of the property in question. Section 57 of the Judicial Code, 28 USCA 118, provides in part as follows:

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the

court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be."

The property of the Reservoir Company is all located in the District of Montana. The defendant, Winston Bros. Company, is a citizen of the State of Minnesota. Therefore, under the foregoing section, the District Court had jurisdiction for the purpose of enforcing the claim of the plaintiff to the property of the Reservoir Company.

Dick vs. Foraker, 155 U. S. 404, 39 L. Ed. 201;

Johnson vs. North Star Lumber Company, 206 Fed. 624;

Louisville, etc. Railway Co. vs. Western Union Telegraph Co., 234 U. S. 369, 58 L. Ed. 1356.

In Thompson vs. Emmett Irrigation Dist., (9 Cir.) 227 Fed. 560, Mr. Circuit Judge Morrow, of this Court, said:

"For the present purposes the allegations of the bill must be taken as true. They state a case for the removal of a cloud upon the title to personal property. It has been held that such a case is within the jurisdiction of a court of equity. 6 Pomeroy's Equity Jurisprudence, para. 729; Sherman v. Fitch, 98 Mass. 59; Voss v. Murray, 50 Ohio St. 19, 32 N. E. 1112; Rosenbaum v. Foss, 4 S. D. 184, 56 N. W. 114; Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048; Earle v. Maxwell, 86 S. C. 1, 67 S. E. 962, 138 Am. St. Rep. 1012; Magnuson v. Clithero, 101 Wis. 551, 77 N. W. 882; New York & New Haven Ry. Co. v. Schuyler, 17 N. Y. 592.

This jurisdiction is recognized as existing in a federal court of equity by section 8 of the act of March 3, 1875 (18 Stats. 472), incorporated into section 57 of the Judicial Code. Jellenik v. Huron Copper Min. Co.,

117 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; Louisville & Nashville Ry. Co. v. Western Union Tel. Co., 234 U. S. 369, 371, 34 Sup. Ct. 810, 58 L. Ed. 1356."

The Complaint States a Cause of Action for a Declaratory Judgment.

In the prayer of the Complaint, the appellant prayed for a permanent injunction and also for a Declaratory Judgment declaring the rights of the parties in the premises. (R. pp. 19-20.) The Federal Declaratory Judgment Act, 28 USCA 400, provides:

"In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

From the allegations of the Complaint it is clear that an actual controversy exists between the appellant and appellee, Winston Bros. Company. We have heretofore pointed out that coercive relief by way of injunction and to quiet the title of the plaintiff could have been granted by the District Court. It has repeatedly been held that when an actual controversy exists, of which, if coercive relief could be granted in it, the Federal Courts would have jurisdiction, and should assume jurisdiction for the purpose of declaring the rights of the parties.

Gully vs. Interstate Natural Gas Co., Inc., (5 Cir.) 82 Fed. (2d) 145; Nashville C. & Stlr. Co. vs. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; U. S. vs. West Virginia, 295 U. S. 463, 55 S. Ct. 789, 79 L. Ed. 1546.

Appellant Derived No Benefits from the Work which was the Foundation for the Indebtedness Evidenced by the Judgment.

It is alleged in the Complaint that when the Bynum Irrigation District acquired its stock in the Reservoir Company, the same was acquired for the purpose of supplying water for irrigation purposes, and in order to irrigate the lands within the district, it became necessary to provide funds for the Reservoir Company in the sum of $122,034.62, for the purpose of enlarging the reservoir. (R. p. 11, par. 11.) The promissory note on which the judgment was rendered represented the balance of the indebtedness of the Reservoir Company incurred to Winston Bros. Company for construction work in connection with enlarging this reservoir. This construction work was done through the ownership of the Irrigation District of 804 shares of the capital stock of the Reservoir Company, all of which was known to Winston Bros. Company, the appellee. The agreement between the Reservoir Company and the appellee, Winston Bros. Company, provided for the enlargement of this reservoir for the sum of $122,034.62. The note on which the judgment was based is for the balance of this contract price. (R. pp. 12-15.)

It is clear from the allegations of the Complaint that the judgment was based on an indebtedness incurred by the Reservoir Company for the sole purpose of providing water for the Bynum Irrigation District. Therefore, all the benefits derived were in favor of the Irrigation District. This District is hopelessly insolvent and bankrupt. (R. p. 14.)

If the property of the Reservoir Company can be sold under and by virtue of a Writ of Execution issued on the judgment, the appellant who derived none of the benefits for which the indebtedness was incurred, would be deprived of its interest in the property for no default on its part, since the appellant has no means of compelling the Bynum Irrigation District to pay the whole or any proportionate share of the judgment in question.

We respectfully submit that the District Court should have overruled the Motion to Dismiss and to have disposed of the case by declaring the rights of the various parties in and to the irrigation works, and to have rendered a permanent injunction restraining the appellee, Winston Bros. Company, from claiming any lien against such irrigation works, and from selling any part of the property, under and by virtue of a Writ of Execution.

Respectfully submitted. Church & Jardine

by Art Jardine

J. H. Freeman

J. P. Freeman

Ernest Abel

Attorneys for Appellant,
Brady Irrigation Company.

No. 9251. 18

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE

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TEXT BOOKS

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Appellee.

BRIEF OF APPELLEE

This suit in equity was instituted by Brady Irrigation Company, a corporation, for the purpose of obtaining a declaratory judgment that the defendant, Winston Bros. Company, did not have a lien upon the assets of the defendant, Teton Co-Operative Reservoir Company, by reason of a judgment against that company, and for the further purpose of preventing defendant, Winston Bros. Company, from levying execution under its judgment against the property of Teton Co-Operative Reservoir Company.

James A. Ackroyd and five others intervened, setting up their rights as bondholders of Bynum Irrigation District. The complaint of Brady Irrigation Company and the bill of intervention of Ackroyd, et al., were dismissed on motion of defendant, Winston Bros. Company, and judgment of dismissal entered. The plaintiff appealed and so did Ackroyd, et al. These and Winston Bros. Company are the only parties now before the court. Separate briefs have been filed on behalf of the separate appellants.

We have given consideration to attempting to answer the arguments of the respective appellants with a single argument but because of a slight difference in the manner in which the facts were pleaded in their respective pleadings, and because of the difference in the nature of their interests, we have come to the conclusion, as we did in the lower court, that it will be advisable to take up each brief separately. Before passing to a consideration of the briefs, however, we believe it will be helpful to define the interests of the various parties to the suit.

The plaintiff, Brady Irrigation Company, is a corpora-

tion owning 15.6% of the corporate stock of Teton Co-Operative Reservoir Company (Tr. p. 6). The appellants, Ackroyd, et al., are the holders of bonds of Bynum Irrigation District which is a statutory irrigation district and which owns 80.4% of the capital stock of the Teton Co-Operative (Tr. p. 14). Appellee is the holder of a judgment against Teton Co-Operative for $29,596.53 (Tr. p. 14) representing the balance due it for construction, enlargement and repair of the reservoir, canals and ditches of the Teton Co-Operative (Tr. p. 12). This allegation is contained in the complaint. The bill of intervention of Ackroyd, et al., merely states that the obligation to Winston Bros. Company was "incurred by Teton Co-Operative Company in and about the conduct of its business and affairs." (Tr. p. 68). The Ackroyd bill of intervention, however, makes the allegations of the complaint a part of the bill "insofar as the same are not inconsistent with" the allegations of the bill (Tr. p. 58) and as the allegation above quoted from the complaint as to the purposes for which the obligation to appellee was incurred are entirely consistent with the allegations of the Ackroyd bill, both the complaint and the bill establish that appellee's judgment results from the construction, enlargement and repair of the reservoir, ditches and canals of Teton Co-Operative.

PRELIMINARY ANALYSIS.

The most serious controversy in the case concerns the nature of the rights of the various interested parties in the waters, water rights, reservoir, ditches and canals of

Teton Co-Operative. We feel that nothing would serve to clarify the issues more than a careful preliminary analysis of this situation.

Teton Co-Operative Reservoir Company is a corporation duly organized and existing under the laws of the State of Montana (complaint Tr. p. 7, bill Tr. p. 62) with a capital stock of 1000 shares of the par value of $150.00 each. (Tr. p. 7). The par value is not mentioned in the Ackroyd bill but this allegation in the complaint is not inconsistent with any allegation in the bill and it is, therefore, adopted by Ackroyd, et al. (Tr. p. 58). There is no suggestion in either pleading that the articles constitute the corporation a non-profit corporation or that it was not organized under the statutes relative to ordinary private business corporations operating for profit. Teton Co-Operative was organized in 1906 (Tr. p. 10, p. 62); it owned certain real estate, a reservoir site, and certain water rights in rivers and streams in Teton County, Montana. (Tr. pp. 9 and 10, p. 63). The complaint alleges (Tr. p. 8) that in 1918 the Teton Co-Operative enacted a by-law reading as follows:

> "A-1. Except as it is otherwise provided in these by-laws, each share of the capital stock of this company entitles the holder thereof to *the use during the irrigating Season of each year,* of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this company, including the right to lease, pledge, sell and *dispose of such use.*" (Italics ours).

The complaint further alleges that there is no other by-law modifying or affecting by-law A-1. (Tr. p. 8). The

Ackroyd bill alleges that at all times since its organization the capital stock of Teton Co-Operative has evidenced the ownership of a right to water for irrigation (Tr. p. 64). To this extent the pleadings differ on this point.

BYNUM IRRIGATION DISTRICT.

Bynum Irrigation District is a statutory irrigation district organized under the applicable Montana statutes (Tr. p. 4, p. 59) and, at the time of its organization, it did not own any water (Tr. p. 12, p. 64). It purchased 804 shares (80.4%) of the capital stock of Teton Co-Operative. (Tr. p. 12, p. 64). The Ackroyd bill alleges that this purchase was made for $500,000.00 payable from the proceeds of the One Million Dollar bond issue (Tr. p. 64), of which interveners, Ackroyd, et al., now own bonds of the face value of $923,000.00 (Tr. p. 61). The complaint alleges that it became necessary to provide Teton Co-Operative with $122,034.62 for the purpose of enlarging its reservoir and repairing its system (Tr. p. 12) and that that is the amount of the contract price of appellee's contract for the work. (T. p. 15). This is not inconsistent with the Ackroyd bill and is therefore adopted by interveners.

BRADY IRRIGATION COMPANY.

Plaintiff, Brady Irrigation Company, is a corporation organized under the Montana statutes (Tr. p. 4, p. 58) There is no suggestion that it is not an ordinary private business corporation authorized to operate for profit. It

is alleged that it was organized solely and only for the purpose of delivering water for irrigation and domestic purposes to its stockholders (Tr. p. 4) and that it owned certain water rights, ditches and canals. (Tr. p. 5). Its by-laws entitle the holder of stock to a proportionate share of "all the waters *appropriated and diverted* by this corporation" (Tr. p. 6) (Italics ours). In addition to the water rights above referred to plaintiff corporation was the owner of 156 shares of the capital stock of Teton Co-Operative (Tr. p. 6). At least so far as plaintiff is concerned, this Teton stock carries rights to the use of water only by virtue of the by-law above quoted. (Tr. p. 8). Neither Teton Co-Operative nor Bynum Irrigation District, owning 80.4% of the stock of Teton Co-Operative, nor plaintiff, owning 15.6% of the stock, owns any irrigable lands. Interveners Ackroyd, et al., own bonds of Bynum Irrigation District.

For various reasons set forth in the briefs plaintiff and interveners seek to prevent the sale on execution by appellee of the physical properties of Teton Co-Operative. Both the complaint and the Ackroyd bill allege that at the time appellee entered into its contract it knew the provisions of the by-laws of Teton Co-Operative and knew that the properties of that corporation were necessary for the irrigation of the lands and premises in the Bynum Irrigation District and the lands of the stockholders of plaintiff, Brady Irrigation Company. (Tr. p. 13, p. 68). A representative bond is attached to the Ackroyd bill and provides in part:

"all being a lien *upon all the land* situated in said Bynum Irrigation District as provided by the laws of Montana." (Tr. p. 73).

Such additional references to the facts as may be pertinent will be made in the course of the argument on the various points.

SUMMARY OF ARGUMENT.

After certain brief general statements we propose to demonstrate that the law of Montana is that the status of stockholders in Teton Co-Operative is not that of joint owners of, or owners of an equitable interest in, its property, but the same as that of stockholders in any corporation. (Thaanum v. Bynum Irrigation District, 72 Mont. 221, 232 Pac. 528; Brady Irrigation Co. v. Teton County, 107 Mont. 330, 85 Pac. (2d) 350).

THE BRADY IRRIGATION COMPANY BRIEF.

In discussing the brief of Brady Irrigation Company the case of Pacific States Savings & Loan Corporation v. Schmitt, 103 Fed. (2d) 1002, is analyzed to show that there, as in the other cases cited, the stock in the water companies was held by persons who owned lands with appurtenant water rights and who had the right under the stock to delivery of their water through the ditches, thus distinguishing it from the case at bar. Other cases referred to by this appellant will be analyzed and distinguished.

Next, the Montana authorities holding that such companies as Teton Co-Operative are not trustees holding a

naked legal title will be discussed. (Hyink v. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71).

Other cases cited by this appellant in support of its argument that the property cannot be sold on execution will be taken up and it will be shown that under the Montana statutes this property is subject to execution. (Sections 9410, 9424 and 9428, Revised Codes of Montana of 1935). It will then be shown that there is no offer by this appellant to do equity.

THE ACKROYD BRIEF.

It will be shown that these bondholders have only a lien on lands within the Bynum Irrigation District and that no lien is pleaded on the properties of Teton Co-Operative. The nature of Bynum Irrigation District will be discussed and it will be shown that under the Montana cases above referred to in this summary the Bynum Irrigation District does not own the water rights or other properties of Teton Co-Operative. Cases cited by appellants, Ackroyd, et al., will be discussed and shown inapplicable and it will be shown that there is no offer to do equity.

THE THEORY OF APPELLEE.

No suggestion of doing equity is pleaded or argued by any of appellants.

A water right is not land in any sense but is personal property. (Verwolf v. Low Line Irrigation Co., 70 Mont. 570 on 578, 227 Pac. 68; Maclay v. Missoula Irrigation

District, 90 Mont. 344, 353, 3 Pac. (2d) 286; Smith v. Denniff, 24 Mont. 20, 60 Pac. 398).

The burden of proving that a water right is appurtenant to land is on appellants. (Hayes v. Buzzard, 31 Mont. 74, 82, 77 Pac. 423; Smith v. Denniff, 24 Mont. 20, 60 Pac. 398).

Whether a water right is appurtenant in each case is a question of fact. (Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255).

The stockholder in Teton Co-Operative is not a joint owner of the properties with the corporation and the corporation is not a trustee for the stockholders. (Hyink v. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71).

Teton Co-Operative is not a mutual corporation. (Canyon Creek Irrigation District v. Martin, 52 Mont. 339, 159 Pac. 418).

Under the Montana statutes appellee is entitled to execution. (Sections 9410, 9424 and 9428, Revised Codes of Montana of 1935).

Neither the water nor the stock of Teton Co-Operative is appurtenant to any land because neither of the stockholders own any land to which it can be appurtenant. An owner of land owning stock in Brady Irrigation Company cannot sell any water right of Teton Co-Operative. The same is true of the owner of land in Bynum Irrigation District. (Oppenlander v. Left-Hand Ditch Co., 31 Pac. 854 (18 Colo. 142); First National Bank of Longmont v. Hastings, 42 Pac. 691, 7 Colo. A. 129.

Appellants are estopped to enjoin execution. (Atchison v. Peterson, 22 L. ed. 414, 20 Wall. 507).

The properties of Teton Co-Operative are subject to sale on execution. (Drysdale's Appeal, 15 Pa. St. Rep. 457).

This court will not enjoin execution in a state court. (High on Injunctions, 4th Edition, Section 268).

The lower court was right. The solution is the payment of the judgment.

GENERAL OBSERVATIONS APPLICABLE TO THE BRIEFS OF BOTH APPELLANTS.

Before passing to a consideration of the separate briefs we desire to make some general observations.

I.

This is a suit in equity and equities must be weighed. This will be discussed in detail later.

II.

The decisions of the Supreme Court of the State of Montana as to the property rights involved are binding on this court.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188,

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290,

The Ruhlin case applies the holding of the Erie case to suits in equity.

III.

General language in any decision is to be applied in the light of the particular facts involved and a general statement may be misleading unless the facts involved are considered.

Cohens v. Virginia, 6 Wheat. 264, 19 U. S. 264, 5 L. ed. 257 on 290.

The language is quoted with approval in *People of Puerto Rico v. Shell Co.,* 302 U. S. 253, 82 L. ed. 235 on 247. The language is also quoted with approval in *Martien v. Porter,* 68 Mont. 450 on 468, 219 Pac. 817.

IV.

The Supreme Court of Montana has defined the rights of the stockholders of Teton Co-Operative Reservoir Company on two occasions. The first case was *Thaanum v. Bynum Irrigation District,* 72 Mont. 221, 232 Pac. 528. This case is referred to by both appellants. The facts are as follows:

Bynum Irrigation District proposed to purchase 804 shares of the capital stock of Teton Co-Operative Reservoir Company in order to obtain water for distribution to lands in the District. Thaanum sought to restrain the district by injunction from expending any money belonging to the district for the stock. In considering the possible methods of procedure and the property rights which would arise, the court said on page 223:

> "Through negotiations the district acquired an option to purchase 800 shares of the capital stock of the reservoir company, *or, as an alternative, the right to purchase from the stockholders owning 800 shares their respective rights to the use of the waters.*" (Italics ours).

and on page 224:

> "It must be conceded that, if the first alternative option be accepted, *the irrigation district will become a shareholder in a corporation, if the second alternative be chosen, it will, in a sense at least, become a joint owner*

*with the holders of the remaining 200 shares of stock in the reservoir company, * * *"* (Italics ours).

As appears from the transcript and the briefs the irrigation district did purchase 804 shares of the capital stock and, under the language above quoted, it simply became a shareholder in a corporation. The point was raised in a different manner in *Brady Irrigation Co. v. Teton County, et al., Ackroyd, et al., interveners*, 107 Mont. 330, 85 Pac. (2d) 350.

The action was brought by Brady Irrigation Company against Teton County and Ackroyd and others, interveners, to secure an injunction against the County of Teton to restrain the issuance of a tax deed to its irrigation facilities (p. 331). The injunction was granted. The County alone appealed. The County had levied its usual property taxes on the lands which Teton Co-Operative owned in fee for reservoir purposes and on the reservoir site, dams, ditches, canals and other like property. Taxes became delinquent and the authorities threatened to take a tax deed. The rights of the owners of stock in Teton Co-Operative are defined as follows on page 332:

"The owners of the stock in the Teton Cooperative Reservoir Company do not own the equitable title to the property of that corporation, but their relation to it is one of contract. (Hyink v. Low Line Irr. Co., 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71)." (Italics ours).

Following an earlier decision the Supreme Court held that when ditches and the right to the use of water conveyed are made appurtenant to lands, their value is included in the value of the land irrigated and is taxed when the land is taxed. (P. 333).

The court quoted with approval from *Verwolf v. Low Line Irr. Co.*, 70 Mont. 570, 227 Pac. 68, 71, a statement that a water right is not land in any sense and when considered alone and for the purpose of taxation, is personal property, but when considered otherwise it is not subject to taxation independently of the land to which it is appurtenant. The only holding of the case is that the value of the water rights and distribution facilities being included in the value of the lands on which the water was used, for purposes of taxation, Teton County could not again tax the water and the facilities. Thus, it appears that in both cases the Montana Supreme Court has held that the owners of stock in Teton Co-Operative do not own the equitable title to the property of the corporation and that they are no different in this respect from stockholders in any other private corporation.

V.

We will turn now to a consideration of the separate briefs.

BRIEF OF APPELLANT, BRADY IRRIGATION COMPANY.

There is no objection to the statement of jurisdictional facts, nor the statement under the subtitle "Jurisdiction of this court," which together take up the first four pages of the brief. This brings us to the statement of the case on page 5. This statement is in the main satisfactory but we wish to point out certain allegations in the complaint which are not mentioned in the statement.

Teton Co-Operative was organized in 1906 (Tr. p. 10) with capital stock of the par value of $150.00 per share (Tr. p. 11). Until 1918 there was no provision in the articles, by-laws or otherwise giving the holder of its stock any rights to the use of water (Tr. p. 8). At least this is our understanding of the allegations at the bottom of page 8 of the transcript. In 1918 the by-law above set forth at page 3 of this brief was adopted. (Tr. p. 8). On page 6 of plaintiff's brief it is stated that the plaintiff was a corporation "organized and operating" only for the purpose of distributing water to its stockholders. The complaint does not allege that it was "organized" only for that purpose and to that extent the statement in the brief was incorrect. On Page 9 of the brief it is stated that the judgment of appellee against Teton Co-Operative arose out of work of *enlarging* the reservoir. The allegations of the complaint are that the obligation was incurred in enlarging and repairing the reservoir and the ditches and canals used in connection with it. (Tr. p. 13). This is important when the argument of plaintiff that it did not benefit from the work is considered.

We come now to the argument commencing on page 16 of the brief of appellant, Brady Irrigation Company, under the subtitle "The property of Reservoir Company is appurtenant to the land irrigated."

Before going into the cases cited in support of that statement we wish to reiterate that this case is different from any of the cases cited by this appellant or, for that matter, by Ackroyd, et al., in that in this case owners of stock in Teton Co-Operative Reservoir Company were

not owners of any land which was irrigated with the waters of, or through the facilities of the Teton Co-Operative. That is, the only stockholders in whom this court is concerned are the Bynum Irrigation District and appellant, Brady Irrigation Company, and there is no allegation that either of these corporations owned any land whatsoever irrigated, or subject to irrigation, from any of the waters or through any of the facilities of Teton Co-Operative Reservoir Company.

The facts of this case are so complicated and the proper application of the law is so dependent upon a clear understanding of the facts that we deem it advisable to reiterate these facts at the commencement of this argument.

The first point made by this appellant is that the by-laws are enforceable contracts (Tr. p. 17). We have no quarrel with this statement nor with any of the cases cited on page 17 on this particular feature.

Appellant next refers to the case of *Pacific States Savings & Loan Corporation v. Schmitt,* 103 Fed. (2d) 1002. It is designated at the bottom of page 17 as "a very similar case," and again on page 25 this case is referred to with the statement that this court "disposed of a situation similar to that presented in the instant case." Appellant quotes liberally from the Schmitt case in support of each statement. As this is a very recent case and one of the few cases cited by appellant which was not cited in the lower court we have deemed it advisable to investigate it fully. We have not only analyzed carefully the opinion in 103 Fed. (2d) 1002, and the opinion in the lower

court, (20 F. Supp. 816) but have also examined the transcript and the briefs.

The facts in the Schmitt case are as follows: One Taylor was the owner of irrigated lands in Nevada and conveyed them, together with appurtenant water rights and water stocks, to John G. Taylor, Inc., a corporation. The corporation thereupon mortgaged the lands together with all appurtenant water rights and mortgagor's interest in all dams, reservoir, ditches, canals and other works for the storage or carrying of water. The water stock was not specifically mentioned. Taylor thereafter made an agreement to pledge to Bank of Nevada the various water stocks as security for advances thereafter to be made to the corporation and to himself. The Bank of Nevada thereafter loaned $32,500.00 to the corporation, taking its notes endorsed by Taylor personally and apparently taking the certificates of water stock, as the same were found in the possession of the Bank when it went into the hands of a receiver. The Bank to whom the corporation gave the mortgage, and the Bank of Nevada, had common officers and directors. The water stock consisted of shares of stock in three canal companies, which shares were owned by Taylor, until transferred to the corporation, and were used by Taylor for conveying waters appropriated by him from the Humboldt River and also waters from the Pitt-Taylor reservoir, all of the waters being for use upon the lands of Taylor which were later mortgaged. None of the three canal companies owned any land and under the Nevada law corporations could not own water rights for irriga-

tion unless they also owned lands to be irrigated. The Pitt-Taylor reservoir was owned by the Humboldt Lovelock Irrigation Light & Power Company which possessed the right to store certain quantities of water taken from the Humboldt River for use on certain designated lands, including the property covered by the mortgage. The rights as to that land were evidenced by two specific certificates. There was no question that under the Nevada law the water rights were appurtenant to the land irrigated and under similar facts we believe this would be the law of Montana. (See Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255, in which case, however, it is stated that whether a water right is appurtenant to land is in each case a question of fact).

In the Schmitt case the lower court held that all water and water rights passed under foreclosure proceedings to the mortgagee, and the plaintiff as its successor, but also held that subject to these rights the receiver of the Bank of Nevada was entitled to a lien on the stock under the pledge agreement. Plaintiff, claiming under the mortgage foreclosure, appealed from this holding and the briefs disclose that the question now before the court was not argued. This court held that the stock under the facts had no value apart from the water rights and ditch rights and further held that all of the interest of Taylor in the stock had passed to the corporation. The relative rights of the appropriators of the water had been formally adjudicated in the state courts, the decree adjuding that the right to the use of the water carried

in the system of the ditch companies was appurtenant to the place of use. The court concluded that the attempt of Taylor to pledge the shares was ineffectual, as they had passed by the mortgage and were no longer his to pledge. On page 1004 this court says:

> "It is a generally accepted principle in the arid states that shares in a nonprofit *irrigation company are appurtenant to the land of the shareholder irrigated through the system.*" (Italics ours).

It is to be noted that the statement is that the shares in a nonprofit irrigation company are appurtenant to the land of the shareholder irrigated through the system. As we have pointed out, none of the waters of Teton Co-Operative are used for the irrigation of any land owned by a shareholder. The shareholders are the Bynum Irrigation District and the Brady Irrigation Company and neither owns any lands to irrigate.

We have gone into this case at considerable length because the same argument will apply to the various other cases cited.

On page 18 appellant states that when the Reservoir Company issued a share of its stock it entered into a contract whereby the holder of such share is entitled to a one-thousandth part of the waters, water rights and irrigating facilities and systems and at the bottom of that page it is stated that the contract entered into with the Reservoir Company and the stockholders granted the stockholder the *perpetual* right to the use of one-thousandth part of such waters and facilities. No transcript page is cited in support of this latter statement and we

do not believe it can be sustained by reference to the complaint.

According to the complaint (Tr. p. 8) the only by-law on the subject entitles the shareholder to the use during the irrigating season of each year of a one-thousandth part of the waters, etc., including the right to sell and dispose of such use. It is apparent that the last provision is distinct from the right to sell the share of stock and that the shareholder himself has the right to sell and dispose of the use to any person and for any purpose. The Brady Irrigation Company, a corporation, as distinguished from the individual owner of stock in Brady Irrigation Company, had that right. A land owner who had shares in the Brady Irrigation Company had a right to receive a proportionate share of waters *appropriated* and *diverted* by that company. At the bottom of page 18 is a quotation from *Adamson v. Black Rock Power & Irrigation Co.,* 297 Fed. 905. The land in question was there sold with appurtenant water rights. The promoter of the irrigation enterprise set forth a declaration of trust declaring that the *instrumentalities necessary to the enjoyment of the lands and water rights sold by it were pledged perpetually to the use of the vendees.* As appears from the quotation in plaintiff's brief, upon the facts in that case, the court held that the instrumentalities controlled by the grantor and necessary to the enjoyment of the water were impressed with a servitude or easement.

In Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466, cited on page 19 of plaintiff's brief, it was held that the Railroad Commission had power to fix the rates

for water. As appears on page 470, under the contract of sale *the water right is inseparable from and transferable only with the land.* The quotation on page 19 again shows that under the facts in that case an easement attached to the land and the servitude upon the source of supply. Whether or not an easement attached to the land and the servitude upon the ditch depends on the facts and the facts of the Allen case render it inapplicable to the case at bar.

On page 20 appellant argues that the Bynum Irrigation District is a public corporation which purchased 804 shares of the stock of Teton Co-Operative for the sole purpose of providing water for the irrigation of lands within the irrigation district. The Thaanum case, (analyzed supra on page 10) is cited and also Section 7202, Revised Codes of Montana of 1935, providing that the Commissioners shall apportion the waters among the lands and that the waters so apportioned shall be appurtenant to the land and inseparable from the same. From this it is argued that by the Thaanum case the Montana Supreme Court by implication decided that "when water for irrigation purposes was thus acquired by the purchase of stock from the Reservoir Company such water became appurtenant to the land within the district." (Appellant's brief, pp. 22 and 23). As above demonstrated, our Supreme Court in the Thaanum case, held exactly to the contrary. It held that if the Bynum Irrigation District took the option to purchase the stock it became a stockholder in the corporation instead of becoming, in a sense, a joint owner in the use of the

water with the holders of the remaining stock. Having taken the option to purchase the stock, Bynum Irrigation District, under the Montana decisions, became merely a stockholder in a corporation. Even if it were a fact that the water became appurtenant to the lands in the Bynum Irrigation District the next argument of appellant is a complete non sequitur.

It is argued (p. 23) that the same thing would be true with respect to the other stockholders. In other words, having based the argument as to Bynum Irrigation District on an express statute, Section 7202, applying only to irrigation districts, appellant now says that the same thing is true of other stockholders in no way affected by the provisions of the statute.

On page 23 appellant quotes Section 6671, Revised Codes of Montana of 1935, stating when a thing is deemed to be appurtenant to land and states that it has been applied in the case of Brady Irrigation Company v. Teton County, et al., 107 Mont. 330, 85 Pac. (2d) 350, which is analyzed at page 11 of this brief. Appellant quotes the statement that the stockholders of Teton Co-Operative do not have an equitable title to the property of the corporation. The quotation continues that *rights under a share of stock of Brady Irrigation Company* to the use of water, when used on certain lands, become appurtenant to such lands owned by shareholders in Brady Irrigation Company, and that such rights are included in the aggregate value of the land in determining its taxable value, and cannot be taxed again to Teton Co-Operative. The language quoted is apparently quoted

for the proposition that the water rights of Teton Co-Operative became appurtenant to lands of shareholders in Brady Irrigation Company. The language is not susceptible of this interpretation. The statement is that the shareholder in Brady Irrigation Company has a contractual right to his pro rata share of the water received by that company, i. e., the Brady Irrigation Company. The court then says "these rights (that is contractual rights) when used on certain lands become appurtenant to such lands." The rights there referred to can refer only to the contractual rights of the shareholders of Brady Irrigation Company *in waters* of Brady Irrigation Company and Brady Irrigation Company does not own the *waters* of Teton Co-Operative. Also, as we have shown, the only pleaded right is to a share of the waters *diverted and appropriated* by Brady Irrigation Company, not to the waters obtained from the Teton Co-Operative.

But disregarding this latter fact for the moment, the Teton County case is authority only for the proposition that the contractual rights of shareholders of Brady Irrigation Company may become appurtenant to their lands. That this is the correct interpretation is borne out by the next two cases cited.

The first case is *Yellowstone Valley Company vs. Associated Mortgage Investors,* 88 Mont. 73, 290 Pac. 255, cited on page 24. That was an action by plaintiff to recover shares of stock of the Big Ditch Company, which was organized for the purpose of extending, enlarging and maintaining a ditch or canal through which plaintiff's lands received water. The right to the use of water rested

on the ownership of the shares of stock and the lands were continuously irrigated by the water which the stock represents. The Ditch Company did not derive profits from its operations but furnished water to its stockholders at cost, the expense being provided by assessments upon the capital stock. Plaintiff mortgaged to defendant its lands and

> "also all water, water rights, ditches, dams, pumps, pipe lines and hydraulic machinery, reservoir sites, aqueducts, appropriations and franchises upon, leading to, connected with or usually had and enjoyed in connection with the herein described premises, and each and every part or parcel thereof, whether represented by shares of the capital stock of ditch or water companies or by direct ownership, or otherwise, which are now owned, or which may have been or shall hereafter be acquired during the existence of this mortgage, and used in connection with the said described premises, or any part thereof. Together with all and singular the tenements, hereditaments and appurtenances, unto the said property belonging, or in anywise appertaining. * * *." (P. 78).

At the time of the execution and delivery of the mortgages plaintiff assigned and delivered to defendant, in connection with the loans, the certificates of stock, and defendant had the stock transferred to it and new certificates issued. Plaintiff in applying for the loans represented that the lands were irrigated and the mortgages were made upon the basis of irrigated land values. The mortgage was foreclosed and a sheriff's certificate of sale issued, failing to mention the appurtenances and failing to make any mention of water, water rights, or shares of stock; the sheriff's deed simply followed the certificate

of sale. Plaintiff commenced an action against defendant to recover possession of the stock, taking the position that the land having been bid in for the entire amount of the mortgage, the stock must be released. Plaintiff's theory was that the shares of stock were personal property and could not be appurtenant to the land. On page 80 the court defines the determinative question as follows:

> "The determinative question is: Under the facts and circumstances shown, did the mortgage include the water rights represented by the shares of stock?"

The court held that upon the facts the shares of stock in the Ditch Company were appurtenant to the land covered by the mortgage and passed to the defendant. The court says on page 84:

> "We do not overlook the point that whether a water *right evidenced by shares of stock is appurtenant to the land upon which the water is used is a question of fact.* But, upon the conceded facts, that question does not trouble us: clearly, the water is appurtenant to the land." (Italics ours).

The decision merely amounts to a holding that upon the facts presented the shares of stock were appurtenant to the land.

The next case is the Schmitt case, 103 F. (2d) 1002, analyzed at page 14 above. The quotation from this case cites the Yellowstone Valley case and reaches the same conclusion on its own facts. Appellant concludes this section of the brief with a statement that since all of the property of Teton Co-Operative is necessary for storing and distributing water it follows that the persons entitled to the use of the water have easements in all of the prop-

erty of the Teton Co-Operative, which are appurtenant to the lands irrigated. We are at a loss to determine what conclusion appellant seeks to draw from this portion of the argument. As we have already pointed out, the argument, at least as to this appellant, is fallacious, but appellant does not seem to draw any conclusion from it. If the conclusion is that the Teton Co-Operative has a naked legal title not subject to execution, it is not the law of Montana. This argument is directly made in the next subdivision of appellant's brief and will be taken up now.

This brings us to page 26 of the brief of appellant and the subtitle "The property of the Reservoir Company is not subject to a lien by reason of the judgment." After referring to the Schmitt and Teton County cases it is stated at the bottom of page 26 that the Teton Co-Operative is the owner of a naked legal title burdened with easements, which are appurtenant to the lands irrigated. This statement depends on the argument theretofore made which, as we have demonstrated, is not sound. Moreover, the contention is definitely refuted in two Montana cases both involving Low Line Irrigation Company.

In Hyink v. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236, the Low Line Irrigation Company was an incorporated mutual ditch company. The right to the use of water owned by defendant and furnished through its canals was represented by shares of the capital stock of defendant. Plaintiff sued for damages for failure to furnish water. The court held on page 404 that the action

was one of contract between the parties. Defendant argued that a stockholder in a mutual company could not recover against the company because the stockholders were tenants in common in the property of the company. The Court refused to adopt this theory saying on page 407:

> "Defendant's argument that a stockholder in a mutual company cannot recover in any event against the company acquires its basis in the theory that the stockholders are tenants in common. Of course, if this be true, then defendant's position is well founded, for a tenant in common cannot be charged with a liability to a cotenant for damages suffered by the latter through no fault of his. (38 Cyc. 84). To adopt the theory of tenants in common, we would have to disregard the purpose and effect of a charter or articles of incorporation; we would obliterate the difference between incorporated and unincorporated mutual companies; the corporation law as to such company would become a nullity. This defendant having formally incorporated under the law and entered the business for which it was incorporated, is charged by law with the duty of exercising reasonable care and diligence in pursuing that business."

This case was cited with approval in Dyk v. Buell Land Company, 70 Mont. 557, 227 Pac. 71. In that case the Low Line Irrigation Company's stock was again involved. The court found, among other things, (p. 569) that the Low Line Company had title to the Low Line and all of the water rights and appurtenances by reason of adverse possession and user, which right was superior to the rights or claims of the plaintiffs, who were stockholders, except that the plaintiffs have the right to receive from the canal the pro rata share of water flowing therein to

which they were entitled as owners of stock of the Low Line Company. Plaintiffs contended that the Low Line Company was but a trustee for its stockholders. The Court abruptly disposed of this contention on page 569 as follows:

> "The assertion of counsel for plaintiffs that the Low Line Company is but 'a trustee for those it serves who own the equitable title,' that is, its stockholders, is directly contrary to the holding of the court in Hyink v. Low Line Irr. Co., 62 Mont. 401, 205 Pac. 236, in which it was held that the stockholders in a mutual irrigation company are not tenants in common but that their relation to the company is one of contract."

It therefore appears that whatever may be the situation in other jurisdictions, the Teton Co-Operative cannot be held to hold only a naked legal title in Montana. Plaintiff argues on page 29 that if Winston Bros. Company were permitted to sell the assets of Teton Co-Operative on execution it would take subject to the rights of the stockholders of Teton Co-Operative. Whether this is true or not, it would not render the complaint or the bill of intervention good as against the Motions to Dismiss unless the property interest of the Teton Co-Operative is exempt from execution. The Hyink and Dyk cases establish a property interest in Teton Co-Operative. That being so the cases cited on page 28 of appellant's brief are inapplicable.

The argument on page 29 is worthy of special analysis. It is stated "the legal title of the Reservoir Company would be burdened with easements in the property, which the stockholders of the *Reservoir Company* have." (Italics

ours). This is as far as appellant could possibly go but would leave him one step short. Appellant is a stockholder but it has no land nor dominant tenement to which an easement could be appurtenant.

On page 30 it is stated that Brady Irrigation Company performs the functions of a public corporation and that if appellee sells the property on execution the corporate existence of Teton Co-Operative would be terminated "since the effect of the contracts between the stockholder and the Reservoir Company would be destroyed." No authority is cited for this proposition and it is apparent that the fact that a corporation is deprived of its property does not terminate its corporate existence. The easy answer is that the corporation can pay the judgment and go on with the performance of its obligations to its stockholders. We find nothing in the complaint indicating any obligation on the part of the Brady Irrigation Company to do more than give the holder of its stock the right to the use during the irrigating season of one-thousandth part of the waters, water rights and irrigating facilities and systems of the company. (Tr. p. 8). We find no allegation indicating the breach of any contract if its water supply and system fail entirely. It is nowhere alleged that Teton Co-Operative is insolvent, merely that its properties are necessary for distributing water to its stockholders, (Complaint paragraph 15, Tr. p. 16) and that the judgment is a cloud on its title. (Complaint paragraph 16, Tr. p. 17).

Appellant then cites *Gue v. The Tidewater Canal Company*, 65 U. S. 228, 16 L. ed. 635. In that case the stat-

utes of Maryland did not authorize the sale of the franchise of the Canal Company and the Court held that the equities of other creditors and of the stockholders would prevent the sale of the property levied upon as it would be worthless without the franchise. The canal was open to all persons and its revenue depended upon taking toll on boats going through the canal which right would not pass to the purchaser at execution sale. The case is not in point.

It is to be noted that in that case the court weighed the equities of other creditors and of the stockholders. Appellant makes no argument as to equities other than to say at the top of page 37 that it is clear from the allegations of the complaint that the judgment was based on an indebtedness incurred for the sole benefit of Bynum Irrigation District. No reference is here made to the transcript for, as we have pointed out, the complaint alleges that the indebtedness was for repairing its system for acquiring and storing water for irrigation purposes (complaint para. 11, page 12) and for enlarging and repairing the reservoir and canals and ditches used in connection with it. (Complaint para. 12, p. 13).

The last case cited in this subdivision of the brief is *Eldredge v. Mill Ditch Co.*, 90 Ore. 590, 177 Pac. 939. As this case is also relied upon by Ackroyd, et al., we deem it advisable at this time to analyze and discuss it. It was a suit in equity to enjoin and set aside the execution sale of the water rights and ditch property of the Mill Ditch Company, a mutual corporation for the distribution of water. The articles of the Ditch Company

are not set forth and it does not clearly appear what a "mutual water serving company" is. The Oregon section with reference to executions is set forth on page 940 as follows:

> "All property, including franchises, or rights or interest therein, of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him and not otherwise: * * *
>
> "Subd. 6. All property of the state or any county, incorporated city, town, or village therein, or *of any other public or municipal corporation of like character.*" (Italics ours).

This statute distinguishes the case, as the Montana statutes contain no such exemption.

Section 9410 of the Revised Codes of Montana of 1935 reads as follows:

> "Judgment lien—when it begins and when its expires. Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon *all real property of the judgment debtor not exempt from execution in the county,* owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied."

The declaratory judgment that the judgment of Winston Bros. Company is not a lien cannot issue therefore unless the property of Teton Co-Operative is exempt from execution.

Section 9424, Revised Codes of Montana of 1935, provides:

> "What shall be liable on execution—not affected until levy. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, *not exempt by law,* and all property and rights of property, seized and held under attachment in the action, are liable to execution."

The statutes providing for exemptions are Sections 9427 to 9430.2, R. C. M. 1935, both inclusive. The only exemption which might be claimed to apply is that set forth in Section 9428, subdivision 10. The first paragraph of the section and subdivision 10 read as follows:

> "Specific exemptions. In addition to the property mentioned in the preceding action, there shall be exempt to all judgment debtors who are married, or who are heads of families, the following property:
>
> 10. All courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, *and appurtenances belonging and pertaining* to the courthouse, jail, and public offices belonging to any county of this state, and all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such city or town to health, ornament, or public use, or for the use of any fire or military company organized under the laws of the state. No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona-fide resident of this state shall have the benefit of these exemptions. No person can claim more than one of the

exemptions mentioned in the first six subdivisions of this section." (Italics ours).

The section is confused in that it applies only to judgment debtors who are married, or who are the heads of families, but assuming that it applies to Teton Co-Operative Reservoir Company, it provides that public offices and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and *appurtenances* belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state, are exempt.

It further provides that nothing mentioned in the section is exempt from execution issued upon a judgment recovered for its price * * * and no person not a bona fide resident of this state shall have the benefit of these exemptions. The Bill of Intervention of Ackroyd, et al., alleges that none of these interveners are residents of Montana (Bill of Intervention, paragraph II). Brady Irrigation Company is not asserted to be a public corporation; its claim is that the only title of Teton Co-Operative is a naked legal title. The complaint, the bill of intervention, and the briefs make claim that the property of Teton Co-Operative is appurtenant to the lands of the stockholders of Brady Irrigation Company and to the lands within the Bynum Irrigation District. The only appurtenances exempt by statute are "appurtenances belonging and pertaining to the court house, jail and public offices belonging to any county of this state." It should be understood that we emphatically deny that the property of Teton Co-Operative is appurtenant, but point

out the statute to show that even if it were it would not come within the terms of the statutory exemptions. Interveners Ackroyd, et al., claim that the property of Teton Co-Operative belongs to the Bynum Irrigation District, a public corporation, and is public property and therefore exempt. We emphatically deny this also but at this time merely point out that it is not Bynum Irrigation District which urges this position but the contention is put forward by non-resident bondholders holding bonds of the District and under the statute they are specifically precluded from having the benefit of the exemptions. Plaintiff and Interveners Ackroyd, et al., have failed to bring themselves within the terms of the statute.

Comparison of the Oregon section of the statute quoted on page 940, and particularly of the last sentence quoted, with the Montana statute shows that whereas property of public or municipal corporations of like character to counties, cities, towns or villages is exempt in Oregon, in Montana there is no such provision. The Court in the Eldredge case cites four classifications of property which are exempt from execution.

The first is the equitable title in land where the legal title is not in the debtor but in some third person. Much reliance is placed in the opinion on this classification but in Montana that kind of property is subject to execution. Thus, in the case of Stone Ordean Wells Co. vs. Strong, 94 Mont. 20, 29; 20 Pac. (2d) 639, it was held that the lien of a creditor who seeks to have a conveyance of realty set aside as fraudulent, may be seized and sold on execution. Statutes in all respects similar to the Montana

statute were held to permit the sale of an equitable interest in real property in the following cases:

See: York v. Stone, 34 Pac. (2d) 911, 178 Wash. 280.
Lynch v. Cunningham, 21 Pac. (2d) 154, 131 Cal. App. 164.

The Eldredge case has been strictly limited in Oregon by the decision of the Supreme Court in a case entitled "In re Rights to Use of Water of White River and its Tributaries," 141 Ore. 504, 16 Pac. (2d) 1109, where the court says on 1115:

"The right of an irrigation company to own and operate its irrigation system is a sacred right to real property. So also is the right of the water users to use the water from the system in accordance with their contracts. See Pleasant View Irrigating Company v. Milton-Freewater & Hudson Bay Irrigation Company, 16 P. (2d) 939, decided December 13, 1932, by Mr. Justice Campbell, where he quotes from the case of Eldredge v. Mill Ditch Company, 90 Ore. 590, 177 P. 939, and it is construed in considering the rights of a ditch company, organized for the purpose of delivering, renting, and selling water rights to irrigators. In the Pleasant View Irrigation Company case the water users constructed a ditch along the line of the Milton-Freewater & Hudson Bay Irrigation Company ditch and claimed the right to the water dating from the time that they had used it from the Hudson Bay Company's ditch. *The opinion in the case of Eldredge v. Mill Ditch Company is not authority for the turning over of the rights of way, reservoirs, reservoir sites, flumes and ditches of every kind and description of the Wapinitia Irrigation Company or the Mt. Hood Land & Water Company. The Eldredge Case is cited by counsel for respondent, suggesting that 'it is closely approaching public ownership of irrigation systems.' With this contention we cannot agree.*"

The Eldredge case is distinguished by the Supreme Court of Washington in Opportunity Christian Church v. Washington Water Power Company, 136 Wash. 116, 238 Pac. 641, where the court says on page 643:

> "In the case of Eldredge v. Mill Ditch Co., 90 Ore. 590, 177 P. 939, certain language was used which, in a general way, tends to support the views of the appellants, but the facts of that case are so different from those here that we think the language ought not to be made applicable to this case. The question there was whether water rights, ditches, etc., held by a mutual water serving company for the benefit of its members, could be levied upon and sold to satisfy an execution against the corporation. It was in discussing this question that the court held that the relationship of the corporation to the members thereof was that of a holding company, trustee, or agent. The decision of the court was greatly affected by the statutes of Oregon, and we are unable to determine from the reading of the opinion whether the plaintiff in that action was a stockholder of the water company or merely had a contract with it whereby it was to furnish him with the water. In any event, there was not involved any question of a stockholder maintaining a suit against a third person who had entered into a contract with the company.
>
> "It is our view that the appellants in this case are in no different relationship with the water company than any stockholder in any private corporation, and that the general rules with reference to the maintenance of suits of this character must apply here."

The case of *Canyon Creek Irrigation District v. Martin,* 52 Mont. 339, 159 Pac. 418, is in point here. In that case one of the important features was that the stock of the corporation was shown by its articles to have a commercial value. (p. 343). The pleadings in this case show

that the par value of the stock of Teton Co-Operative was $150.00 per share. The Articles of Teton Co-Operative are not at this time before the court but there is no allegation that the Articles constitute the Co-Operative a mutual company, and such a showing is necessary on the pleadings to bring the plaintiff and the interveners, Ackroyd, et al., within the holding of the Eldredge case, if the Eldredge case were to be followed.

The next classification in the Eldredge case is property held by a trustee under an ordinary naked trust. That situation does not obtain here. Hyink v. Low Line Irrigation Company, 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Company, 70 Mont. 557, 227 Pac. 71, both of which cases are above analyzed.

The third classification in the Eldredge case concerns franchises of corporations and rights to an office—neither of which are involved here.

The fourth classification is property so involved with the interest of the public that it cannot be sold without interfering with the rights of the public. This is not the law of Montana. Canyon Creek Irrigation District v. Martin, 52 Mont. 339, 159 P. 418. Completely distinguishing the case on the facts, however, is the fact that *it appears from the opinion in the Eldredge case that the individual stockholders owned the land on which the water was used.* It is not clear from the opinion whether they did not also own the actual water rights but it is a sufficient ground of distinction between the Eldredge case and the case at bar that the stockholders of Teton Co-Operative in no instance own any land, the stock being

held by Brady Irrigation Company and Bynum Irrigation District.

Appellant then closes with the argument on page 33 that execution should be enjoined since appellee would "most probably, realize scarcely anything from the irrigation works." This seems a bit gratuitous under the complaint, for it is not deducible from it; it also seems incongruous in a suit in equity. Leaving out of consideration the owners of land in Bynum Irrigation District it appears from paragraph 19 of the complaint on page 18 that 10,000 acres of Bynum Irrigation District land is irrigated from the reservoir. So, apart from the Bynum Irrigation District lands, the sum of $1.89 per acre on the lands of stockholders of Brady Irrigation Company would have liquidated the obligation in 1927 (Tr. p. 14) and approximately $3.00 an acre would have done it after the judgment was obtained. (Tr. p. 14). Instead of such a simple solution appellant now says that appellee, having done the work on the construction and enlargement and repair of the dams and reservoirs of a private corporation, should be enjoined from realizing on its judgment because irreparable damage would be done the stockholders of the Brady Irrigation Company. Obviously there is no equity in the claims of appellant, Brady Irrigation Company. It is respectfully submitted that the lower court properly dismissed the complaint.

THE ACKROYD BRIEF.

We again wish to make certain comments with reference to the statement of the case. It is nowhere claimed

that the lien of the bonds extends to the properties of the Teton Co-Operative and under the provisions of the bond that it is a lien "upon all the *land situated in said Bynum Irrigation District*" the reason is apparent. (Tr. p. 73). It is not claimed that the reservoir is in the Bynum District.

The articles of Teton Co-Operative are not pleaded.

The net result of services at cost and at a profit, with distribution of profits pro rata to the stockholders, is the same.

On page 6 appellant quotes a conclusion in the pleadings that the Teton Co-Operative is only an instrumentality or agency of its stockholders but unless conclusions are consistent with the facts pleaded they are not to be taken as admitted by a motion to dismiss.

Halko v. Anderson (Mont.), 93 P. (2d) 956 (Adv.)

The position of appellants, Ackroyd, et al., is stated on page 9 of the brief and is that Teton Co-Operative has but a bare legal title which may not be sold under the judgment and that our only remedy is to compel the district to levy charges as taxes to raise the money. Obviously, we have no right against the District. It is not indebted to us in any way, shape or form, nor do we have a judgment against it.

Appellant also suggests the right to enforce against the remaining stockholders, but having contracted with a corporation and obtained a judgment against it we cannot, of course, take execution against the property of its stockholders.

Subdivision A of the brief commencing on page 11 is devoted to a discussion of the public character of the

property involved, the argument being based on the proposition that the Bynum Irrigation District is a public corporation. Cases are cited from Montana and from various other jurisdictions. We see no reason to go beyond the Montana decisions. Once again the Thaanum case (72 Mont. 213, 232 Pac. 528) defines the nature of the very district in question. The injunction was sought under a constitutional provision prohibiting the state and any county, city, town, municipality, or other subdivision of the state from giving or loaning its credit in aid of any individual, association or corporation. In discussing the nature of the Irrigation District the court said on page 225:

> "Such a district is not the state; neither is it a county, city, or town. It is not a municipality, for the term 'municipality' refers to a municipal corporation (Black's Law Dictionary) and in this state only incorporated cities and towns are municipal corporations (Hersey v. Neilson, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30). It remains to be determined whether an irrigation district is comprehended by the term 'other subdivision of the state.'
>
> "A word or phrase may have different meanings as it is employed in different connections (Barnes v. Montana Lumber & Hardware Co., 67 Mont. 481, 216 Pac. 335), *and the particular meaning to be attached to it in a given statute or constitutional provision is to be measured and controlled by the connection in which it is employed, the evident purpose of the Act, and the subject to which it relates.* (Northern Pac. Ry. Co. v. Sanders County, 66 Mont. 608, 214 Pac. 596)." (Italics ours).

The court held that the irrigation district was not within the constitutional prohibition, saying on page 227:

"Because the state, a county, city, town or municipality has, and an irrigation district has not, the authority to impose general taxes, the reason for the restriction upon the first class of public corporations fails, when considered with reference to an irrigation district, and leads to the conclusion that an irrigation district was not in the contemplation of the framers of our Constition in drafting section 1, Article XIII, above, or in the contemplation of the people in adopting it."

Subdivision B of appellant's brief takes up the Thaanum case. The burden of the argument is that Teton Co-Operative has legal title to the real estate and that by its holding in the Thaanum case our Supreme Court held that "that stock and all it represents, namely, the irrigation system involved became public property in every sense of that term." As we have pointed out, the Supreme Court held that the Bynum Irrigation District had two options and took the one which constituted it the owner of the corporate stock instead of the owner of a joint interest. (Supra, page 10.) The argument continues that there is no difference in fact or in law between the purchase of stock and the purchase of the irrigation system, but the Thaanum case and the Teton County case hold directly to the contrary.

It is then argued that by the purchase of stock the Teton Co-Operative became a mere holding company, agent, or trustee for Bynum Irrigation District. This is directly contrary to the holding in the Hyink and Dyk case (supra, pp. 25 and 26).

The same thing is applicable to the argument that the purchase of 80.4% of the stock created the same condition in legal effect as if the district had bought the

irrigation system and allowed surplus water to the extent of 19.6% to go to some private persons. (Appellant's brief p. 20).

This leads, on the same page, to the erroneous conclusion that the water rights were acquired under the Thaanum case and are owned by the Bynum Irrigation District. This is obviously an attempt to bridge the gap necessary to bring this case within such decisions as the Schmitt case, but it is not the law of Montana. It is obvious that Bynum Irrigation District has no water rights which it could sell or transfer; all that it could transfer would be capital stock of Teton Co-Operative.

It is next stated on page 21 that water rights do not exist apart from the dams, ditches and waters, but this is directly contrary to the Teton County case, 107 Mont. 330, 85 Pac. (2d) 350, where the court says on 333:

> "In the case of Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 Pac. 68, 71, this court said, 'A water right—a right to the use of water—while it partakes of the nature of real estate (Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054), is not land in any sense, and, when considered alone and for the purpose of taxation, is personal property."

Appellant then calls attention to this very case stating that it holds that the irrigation facilities held by Teton Co-Operative were not subject to taxation but, as we have pointed out, the reason for the holding was that their value had already been taken into account in appraising the lands on which the water was used. The court in that case went behind the corporate entity only to look at the nature of the property taxed and determine

that while the Bynum Irrigation District owned the stock it did not own the water rights and that their value was already included in the value of the land taxed.

This brings us to Subdivision II on page 23 where the argument is made that Teton Co-Operative is a mere trustee of the real estate. We have already covered this point (supra p. 26) and will not here repeat what was there said. Appellant agrees on page 26 that the point presented here was not involved in the Schmitt case and then passes to the Eldredge and Gue cases analyzed above at pages 27 to 35.

In *Northern Pacific Ry. Co. v. Schimmell,* 6 Mont. 161, 9 Pac. 889, cited on page 29, the Supreme Court of Montana held that because the railroad was a military and post road used for the benefit of the United States Government, property owned by it and reasonably necessary to its operation was exempt from execution (see p. 165).

We come now to Subdivision III on page 30, making the argument that the property may not be sold on execution because of its public character. The argument is summarized on page 31 stating that first, the statutes of Montana do not authorize the sale and second, that it is against public policy. We have shown on page 30 that the statutes do authorize the sale and, moreover, the Teton Co-Operative is not a public corporation, and that we do not claim any right to sell the property of Bynum Irrigation District, which is the only corporation involved which is claimed to be a public corporation.

The entire argument is based on the false premise that

the real estate of Teton Co-Operative belongs to the Bynum Irrigation District. To begin with, the Montana cases above cited show that the Bynum Irrigation District has no right in the ditches or reservoir. Bynum Irrigation District owns no land to which any ditch rights could be appurtenant and it therefore cannot even have an easement in the ditches and reservoir but at most has a contractual right to have water delivered to it.

In the next place Bynum Irrigation District owns only 804 of 1000 shares of the Teton Co-Operative. Yet it appears to claim title to all of the property of the Co-Operative. The premise not being correct, the conclusions are necessarily incorrect.

Montana has by statute settled the argument as to the right to execution. It provides that all real property not exempt from execution shall be subject to a lien and to execution. It then provides what property is exempt. This does not include the property here in question. (This brief supra p. 30). The argument on page 32 ff. is beside the point. Moreover, it assumes, as other portions of the brief assume, that Bynum Irrigation District owns all of the assets of Teton Co-Operative, whereas, given its fullest effect, the argument could only go to 80.4%.

The case of U. S. ex rel. Masslich v. Saunders, et al., 124 F. 124 and 126, quoted from on page 34 involves a judgment against a city; not against an independent corporation in which the city held stock.

Walkley v. City of Muscatine, 6 Wall. 481, 18 L. ed. 930, referred to as a "controlling case" on page 34 merely

holds that against a city mandamus, instead of a bill of equity, is the proper method of compelling the levy of a tax.

Since appellant does not bother to point out what "general principles" are discussed in California Iron Yards Co. v. Commissioner of Internal Revenue (C. C. A. 9) 47 Fed. (2d) 514, we will only point out that it merely holds that the federal statute with reference to federal income tax matters governs in regard to waivers of limitations.

Whiteside v. School District No. 5 et al., 20 Mont. 44, 49 Pac. 445, holds that in the absence of express statutory provisions a mechanics' lien does not attach to a school building. The case is short and clearly is inapplicable. In the first place the execution statute does not exempt property of the nature here in question, even if owned by an irrigation district. In the second place, the conclusion of the court on page 46 shows that the case does not purport to deal with a direct judgment creditor who sold property to the trustees, and that the decision is based largely on the proposition that the claim can be collected. The court says:

> "The appellant contends, however, that the very last clause of sub-division 9 of the exemption statute renders a school house subject to the levy of an execution. After providing that public property shall be exempt, the statute continues: 'But no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon.'
>
> "But we think that the language quoted is entirely inapplicable to the case of a sub-contractor who is seek-

ing to foreclose a mechanic's lien. Not having the right to subject the property to the lien, it should not be subjected to a sale to enforce such lien. (State v. Tiedemann, 69 Mo. 306).

"Whatever may be the rights of a direct judgment creditor of the school district, who has sold property to the trustees for public uses, it is certain that the statute does not mean to limit the previous general words of exemption by permitting a school house to be sold under an execution in favor of a sub-contractor who has no special lien, for a small part of its value, and perhaps to be forever lost to the school district before funds could be collected by a tax levy wherewith to pay the amount of the debt."

The next case cited is *State v. Blake* (Utah) 20 Pac. (2d) 871. In that case the court said on page 876 that the drainage district exercised governmental function, which is not true of Teton Co-Operative.

In *People ex rel. Post, et al., v. San Joaquin Valley Agri. Assn., et al.* (Cal.) 91 Pac. 740, the court said on page 744 that the association was merely a state agency, which is likewise not true of Teton Co-Operative.

Sherman County Irr. & Water Power & Improvement Co. v. Drake, et al., (Neb.) 91 N. W. 512, merely held, as the quotation on page 37 of the brief shows, that in the absence of a statutory authorization, the property of the canal company could not be sold on execution. We do not seek to sell the property of a public corporation, but of Teton Co-Operative, and the Montana statutes permit its sale.

Do these interveners come here with clean hands? Appellant says on page 38 that to get relief in equity, that is necessary. The bonds they hold give them a lien

on all the land in the district. (Tr. p. 73). Their bonds were obviously without value unless the reservoir was constructed and repaired. They got the benefit of the work done by appellee. Their investment proved "sour." So they seek to prevent appellee from realizing on the contract for the work done by obtaining execution against the assets of the corporation, controlled by the Bynum Irrigation District, which contracted to pay for it. Why? Because, they say, an execution sale would jeopardize and destroy the rights and liens of interveners. Against what? They have under their bonds no rights or liens against the property of Teton Co-Operative. The execution will not affect the lien against the lands in the District. It will affect the value of the lands, unless the judgment is paid, but those lands consist of 47,200 acres (Tr. p. 11) which benefited directly from the construction. If the owners had wanted to protect their ability to get water from Teton Co-Operative, some forty cents an acre would have done it when the work was finished. If the owners of Brady Irrigation Company stock had come in thirty-four cents an acre would have done it. But, no. Appellee should bear the whole loss so that these bondholders will be protected in an investment secured by a lien on lands against which no recourse is sought by appellee.

There is neither pleaded nor suggested by this appellant any desire or willingness to do equity in any particular.

THEORY OF APPELLEE.

To begin with there is no reason that equity should aid either appellant. Neither pleads any inequity on the part of appellee or any offer to do equity on the part of appellants. What it amounts to is that appellee would lose the balance due it so that the recipients of the benefit of the work which appellee did would get it for nothing.

THE NATURE OF A WATER RIGHT

A water right in Montana is not real estate. The nature of a water right is set forth in Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 P. 68, where the court says on 578:

> "A water right—a right to the use of water—while it partakes of the nature of real estate (Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054), is not land in any sense, and, when considered alone and for the purpose of taxation, is personal property. (Helena Water Works Co. v. Settles, 37 Mont. 237, 95 Pac. 838)."

See also Maclay vs. Missoula Irrigation District, 90 Mont. 344, 353, 3 P. (2d) 286, and Smith vs. Denniff, 24 Mont. 20, 60 Pac. 398.

An easement for the conveyance of water across the land of another is an interest in real estate. (Smith v. Denniff). The burden of proving that a water right passes with a conveyance, which is generally spoken of as the burden of proving that a water right is appurtenant, is upon the person alleging it.

Hayes v. Buzzard, 31 Mont. 74, 82, 77 Pac. 423.

Smith v. Denniff, 24 Mont. 20, 60 Pac. 398.

That being so the complaint must demonstrate that the water right is such "appurtenance" in order to state a cause of action. The question of whether a right to the use of water represented by stock is such an "appurtenance" is a question of fact.

Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255.

The stockholder entitled to the use of a portion of the water of the corporation by reason of ownership of stock is not a tenant in common in the property of the corporation and the corporation is not a trustee for the stockholders.

Hyink v. Low Line Irr. Co., 62 Mont. 401, 205 Pac. 236.

Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71.

A corporation acquiring a reservoir and storing water to irrigate the lands of its stockholders, with a corporate stock which is commercially valued and with broad powers set forth in its articles as to the disposition of water, is not a mutual concern with functions of carriage only and its articles and not its by-laws determine its essential nature.

Canyon Creek Irr. District v. Martin, 52 Mont. 339, 159 P. 418.

THE RIGHT TO EXECUTION.

The only property exempt from execution in Montana is that which is specifically exempt. Section 9428, R. C. M. 1935.

The only exemption which might apply is Subdivision 10, Section 9428. We will not repeat the argument as to the property covered by that exemption. There are, however, other provisions of that section which are important at this time. These provisions read as follows:

> "No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions."

It is alleged in the complaint (paragraph 12, Tr. p. 12-14) that the judgment of Winston Bros. Company is based on a promissory note for the balance due on a contract for the enlargement and improvement of the reservoir. The judgment is therefore for the price of the enlarged or improved reservoir and for this reason would not be exempt even if it were a court house or jail, or any other species of property specifically described.

Furthermore, the Interveners, Ackroyd, et al., are all nonresidents of Montana and subdivision 10 provides that no person not a bona fide resident of the state shall have the benefit of any of the exemptions set forth in subdivision 10.

NEITHER THE WATER NOR THE STOCK IS APPURTENANT TO ANY LAND.

With the above statement of the principles involved it readily becomes apparent that no stockholder of Brady Irrigation Company and no owner of land within the Bynum Irrigation District has any water right which could give him any rights in a ditch or reservoir.

Under the allegations of the complaint and of the bill of intervention either Brady Irrigation Company or Bynum Irrigation District has the right to sell or dispose of the water to the use of which it is entitled by reason of its stock ownership to any person or for any person (by-law A-1, Tr. p. 8). If either stockholder ties itself up by contract to deliver a proportion of its water to a given person, it does not make any water appurtenant to the land of the stockholder for it can supply either water which it has appropriated or which it may obtain from any other source. Brady Irrigation Company has its own appropriations. (Tr. p. 5). As a matter of fact Brady Irrigation Company has no contract or other obligation to deliver any water obtained through stock ownership in Teton Co-Operative. Its obligations are set forth in its by-laws. (Tr. p. 6). The waters of Teton Co-Operative are neither appropriated nor diverted by Brady Irrigation Company. Under these circumstances stock in Brady Irrigation Company might come within the purview of the Schmitt case. That would depend on the facts, but if the stock in Teton Co-Operative is appurtenant it must be appurtenant to some land. If it were appurtenant to the land of a stockholder of Brady Irrigation Company, or to the land of a land owner in Bynum Irrigation District, it would pass with the land. Obviously this is impossible. The Brady Irrigation Company, moreover, owns no land to which rights could be appurtenant and the same is true of the Bynum Irrigation District. The right of a stockholder of Brady Irrigation Company to the use of

water is dependent on the rules and regulations of the corporation. (See by-law A-1 set forth in the complaint and the brief of Appellant Brady Irrigation Company).

The right of a landowner in Bynum Irrigation District to the use of water depends on an apportionment by the Commissioners (Section 7207.2, R. C. M. 1935). That section reads as follows:

> "Commissioners' power to regulate, supervise, apportion and control distribution of water. In addition to all other powers granted them by the laws of Montana, boards of commissioners of all irrigation districts now or hereafter organized under any law of this state, shall have the power and authority to regulate, supervise, apportion and control the furnishing and delivery of water through the distribution system of the district; provided, that such authority to regulate, supervise, apportion and control shall not apply to users who have water rights or ditch rights, established, acquired by court decree, use, appropriation or otherwise, at the time or prior to the organization of such district, without regard to whether said distribution system, or any portion thereof belongs to the district or to the owner of lands served by said district."

It is apparent that the legislature contemplated that landowners might have water rights or ditch rights prior to the organization of the district and separate and apart from any rights under the district, but that apart from such rights the right to the use of water was subject to an apportionment and control by the commissioners of the district. The owner of land in the Bynum Irrigation District could not sell any water right with his land unless he owned such water right apart from the water contracts of the district, and in such event he could sell

it for use on land outside the district. He could not permanently dispose of the right of his land to water of the district unless he also sold his land and in no event could he by purporting to dispose of his right to the use of water, free his land from the liability of irrigation district assessments. An owner of a water right can sell it apart from and separate from the land.

Maclay v. Missoula Irrigation District, 90 Mont. 344, 3 P. (2d) 286.

Smith v. Denniff, 24 Mont. 20, 60 Pac. 398.

It follows that he does not own any water or water right.

An owner of land in the Brady Irrigation Company cannot sell any water right of the Teton Co-Operative. The following two Colorado cases throw considerable light on this situation. Oppenlander v. Left-Hand Ditch Co., 18 Colo. 142, 31 P. 854, where the court said on 857:

"In the next place, Baun's rights to water from Left-Hand Ditch were dependent upon, and evidenced by, his two shares of stock. These he could legally transfer only by assignment on the books of the corporation. While Baun caused the land to be conveyed to his wife and children, he did not convey the stock, nor does it appear that he entered into any contract or received any consideration for the conveyance of the stock. On the contrary, he retained the stock, and continued to act as a stockholder of the company, in his own name. It is true, Baun used the stock as a means of procuring water for the benefit of the land which had been conveyed to his children; but he continued to occupy the land for his own benefit, while he pledged the stock as collateral security, and thereby lost it. With the loss of the stock, he lost all title to the water rights dependent thereon; so that neither he, nor his grantees of the

land, can have any water rights by means of such stock."

and First National Bank of Longmont v. Hastings, 7 Colo. A. 129, 42 Pac. 691, where the court said on 692:

"Water rights belonging to land and stock in a ditch corporation are two essentially different kinds of property. A real-estate owner may have the right to water for the purpose of irrigating his land without owning any ditch stock, and a stockholder in a ditch company may be without the right to water for irrigation or without land to irrigate. Water rights for irrigation are regarded as real property, and shares of stock in a corporation are personal property. The deed conveyed all rights in water pertaining to the land described for the purpose of its irrigation, but it no more conveyed the grantor's water stock than it conveyed his horses."

No cases are cited to the effect that one not the owner of a water right can obtain an easement in a ditch for the conveyance of water. The owner of a water right in this case is Teton Co-Operative Reservoir Company and the rights of plaintiff and of Bynum Irrigation District depend on contract with the owner of the water right.

ESTOPPEL TO ENJOIN EXECUTION.

The same equitable principles apply in a case of this kind that apply in any other case where equitable relief is sought.

Atchison v. Peterson, 22 L. Ed. 414, 20 Wall. 507. This case arose from Montana and involved water rights. The Court said on page 417:

"But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity

> will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged; whether it be irremediable in its nature; whether an action at law would afford adequate remedy; whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."

It is suggested that Winston Bros. Company has some other remedy to obtain the payment of its judgment but any such remedy which it might attempt to enforce against Bynum Irrigation District property or property of Brady Irrigation Company, or its stockholders would be met by the defense that its contract is with Teton Co-Operative and its judgment against Teton Co-Operative. In equity if plaintiff or interveners, Ackroyd, et al., wish to prevent the sale of the assets of Teton Co-Operative on the ground that they are owned equitably by plaintiff or Bynum Irrigation District, they should first offer to do equity by paying or providing for the payment of the judgment. Both plaintiff and Bynum Irrigation District have accepted the benefits of the work done by Winston Bros. That being the case they cannot now obtain an injunction to prevent the collection of that judgment.

In Callaghan v. Chilcott Ditch Co., 37 Colo. 331, 86 Pac. 123, it was held that a stockholder in a ditch company who had voted for an assessment could not defend against payment of it on the ground that the stock of the company was not all paid for as required by the by-laws.

In Nelson v. McAllister Improvement Company, 155

Ore. 95, 62 Pac. (2d) 950, it was held on page 954 that where a district improvement water company issued bonds pursuant to unanimous vote, a member of the company was estopped to assert a defense that the district was formed without the employment of an engineer to investigate the advisability, which appointment was required by law.

In High on Injunctions (Fourth Ed.), Sec. 1212, the following statement appears:

> "Where the conduct of the person complaining has been such as to amount to a waiver of his right to object to a proposed conversion of the corporate funds to other than the uses for which they were originally intended, he will not be allowed relief in equity against such use of the funds."

Maryland Savings Institution v. Schroder, 8 Gill & J 93, is cited in support of this statement. In that case the syllabus contains the following:

> "Where a party reaps profits by his own voluntary act, founded upon contract with another, he is not as against the creditors of such other party at liberty to vacate his contract to their prejudice, and claim to participate in equity and conscience, upon the insolvency of such other party, equally with his creditors in his estate and in opposition to the terms and effects of the original agreement."

In Thompson on Corporations, Section 2092 contains the following:

> "The principle (estoppel) is especially operative upon participating stockholders who own a controlling interest in the stock"

and in the 1931 Supplement to Thompson on Corporations, Section 2092 reads:

"Corporate bonds in the hands of bona fide holders cannot be repudiated by the stockholders, where the proceeds of such bonds are retained by the corporation." Citing Gibson v. Kansas City Refining Co., 32 Fed. (2d) 658.

None of these cases are directly in point but all of them lead inevitably to the conclusion that the stockholders of Teton Co-Operative, having taken advantage of the benefits of the contract upon which the judgment of Winston Bros. Company is based, cannot now in equity prevent a sale of the assets of the corporation, at least without offering to pay the judgment, which they have not done.

The Montana cases demonstrate that Teton Co-Operative has more than a naked legal title to its property and in fact that it has legal title not even subject to easements but possibly subject to certain contract rights. Such a right can be sold on execution. This is well exemplified in the case of Drysdale's Appeal, 15 Pennsylvania State Reports, 457. As these reports are not readily available and as the decision is brief, we will set it forth in full:

"The opinion of the court was delivered April 7, 1851, by Gibson, C. J. The lot in question was purchased by the congregation, and the title to it was vested in some of the members in trust, to permit it to be used as a church and school-house. The church was erected, but it was encumbered with mechanics' liens; and to relieve the congregation from the immediate pressure of them, Dr. Ely agreed with five others to purchase them, and give the congregation time to extinguish them. They were transferred to him, and paid for with money advanced by the associates in unequal propor-

tions. After reasonable indulgence, they found that nothing had been, or probably would be done by the congregation; and they agreed to bring the property to the hammer, vest the title in Dr. Ely in trust to sell it, pay their advances out of the proceeds, and give the surplus, if any, to the congregation. It was sold by the sheriff and conveyed to Dr. Ely, who executed a declaration of trust stating the terms of the agreement; and the question is, whether he acquired, by the sheriff's deed, an interest which could be bound by a judgment.

"Unlike the beneficiaries in Allison v. Wilson, and Morris v. Brenizer, who had only an interest in the execution of a power, he had an estate in the soil. He had the legal title, which always may be bound to the extent of the beneficial interest covered by it. It was divested by the sale; and as it certainly rested somewhere, it passed by the sheriff's conveyance to the purchaser. The auditor erred in reporting that it was purchased by Dr. Ely for the congregation on the original trusts; the declaration of trust shows it was not. It was purchased to sell it again to any one who would pay for it; and it had been found that the congregation could not. Dr. Ely was a trustee of the title, not for the congregation beyond its interest in the possibility of a surplus, but for his associates and himself. He was a trustee with a beneficial interest of his own; and it is immaterial whether his equitable estate merged in the legal estate or not. As he had a successor, who could execute the trust only by selling the title entire, it may be assumed that it did not; but his equitable estate in the soil remained in him; and it is not to be disputed that such an estate may be bound by judgment.

"We are, therefore, of opinion and it is so ordered that the decree of the Common Pleas be reversed so far as regards the appellant's judgment, which is decreed to be paid out of the fund in court in its order."

This court will not enjoin execution in state court. High on Injunctions (Fourth Ed.) Sec. 268, after discussing the history of the question, states:

> "The latter and, unquestionably, the better doctrine, however, of the federal courts is that they will not interfere by injunction to prevent a sale of one's property under execution against a third person, issued from a state court, but will leave the party complaining to seek his remedy in the state forum." Citing the following cases:
>
> Daley v. Sheriff, 1 Woods 175.
>
> American Ass'n v. Hurd, 59 F. 1.
>
> Mills v. Provident Loan & T. Co., 100 F. 344.

THE LOWER COURT'S DECISION.

We respectfully refer this court to the decision of the lower court reported in 27 F. Supp. 503. We submit it is well reasoned and correct. No new cases affecting the result are cited. The situation is well summed up in the following quotation from page 508:

> "This case presents rather a difficult situation for all concerned, and the difficulty is not likely to end with this decision, but the court has endeavored to keep in view the way to substantial justice. Of course, the best way out is to make arrangement for the payment of the judgment. It is quite evident that all who are using water from this reservoir are deriving benefit from the improvements made by defendant, in fact they are the chief beneficiaries."

It is respectfully submitted that the judgments of dismissal should be affirmed.

R. H. GLOVER,
S. B. CHASE, JR.,
JOHN D. STEPHENSON,
Attorneys for Appellee,
Winston Bros. Company.

No. 9251.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS, and FRANK E. NELSON,
Appellants,

vs.

WINSTON BROS. COMPANY, a corporation,
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and

BRADY IRRIGATION COMPANY, a corporation,
Appellant,

vs.

WINSTON BROS. COMPANY, a corporation,
Appellee.

REPLY BRIEF OF APPELLANT

BRADY IRRIGATION COMPANY

CHURCH & JARDINE,
J. W. FREEMAN,
J. P. FREEMAN,
ERNEST ABEL,
Attorneys for Appellant,
Brady Irrigation Company.

TABLE OF CASES

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Appellee.

REPLY BRIEF OF APPELLANT

BRADY IRRIGATION COMPANY

Upon Appeal from the District Court of the United States, for the District of Montana.

ARGUMENT

Counsel for appellee, on page 8, and again on page 48, of their brief, contend that neither the water appropriated and diverted by Teton Cooperative Reservoir Company, nor the stock which entitles the owners to a certain proportion of such water, is appurtenant to the land. This argument is based upon the fact that neither the Brady Irrigation Company or the Bynum Irrigation District own any land to which water or stock could become appurtenant.

In Paragraph VI of the Complaint of Brady Irrigation Company, it is alleged that the Teton Cooperative Reservoir Company, ever since its organization has been and is now operated solely and only for the purpose of delivering water for irrigation and domestic purposes for the irrigation of lands owned or controlled by its stockholders. Its only income has been derived from assessments levied against its outstanding capital stock and the proceeds of sales of the same. The money thus obtained has been used only for the purpose of constructing, maintaining and repairing the irrigation facilities (R. p. 7). In Paragraph IX of the Complaint of the Brady Irrigation Company it is alleged that the Teton Cooperative Reservoir Company has constructed on the lands held by it, certain irrigation works for the sole purpose of storing and supplying water for irrigation and domestic purposes to its stockholders, which had theretofore been appropriated by it (R. p. 10). It is clear from the allegations of the Complaint that the Teton Cooperative Reservoir Company never at any time since its organization, used any of the water which was appropriated by the Company for irrigation purposes on land owned by this Reservoir Com-

pany. The purpose of its organization was to supply water to its stockholders. It has been repeatedly held in Montana that an appropriator of water for irrigation purposes need not be either an owner or in possession of land in order to make a valid appropriation for irrigation purposes. Toohey vs. Campbell, 24 Mont. 13, 60 Pac. 396; Smith vs. Denniff, 24 Mont. 20, 60 Pac. 398; Bailey, et al. vs. Tintinger, et al., 45 Mont. 154; Thomas, et al. vs. Ball, et al., 66 Mont. 161, 213 Pac. 597; St. Onge, et al. vs. Blakely, et al., 76 Mont. 1, 245 Pac. 532.

In Bailey, et al. vs. Tintinger, 45 Mont. 154, 122 Pac. 575, Lee, Hall and Hatch filed notices of appropriation of 5000 inches of water of Big Timber Creek in 1892, and commenced construction of a distributing system. This appropriation was for the purpose of irrigating lands upon which they had some claim, as well as to sell, rent and otherwise distribute water to other persons. Some work was commenced on the construction of a distributing system by the three appropriators. Thereafter, Hatch succeeded to the interests of Hall and Lee, and continued the work to such an extent that small quantities of water were used during 1894 through the main canal. In 1895, one Wormser succeeded to the rights of Hatch. About the time that Wormser succeeded to the rights of the appropriators, Holland Irrigation Canal Company was organized under the laws of the State of Montana, for the purpose of constructing a canal system upon the north fork of Big Timber Creek to irrigate lands lying in the vicinity and to sell, rent or otherwise dispose of water for irrigation and other purposes.

Immediately after its organization, Holland Irrigation Canal Company succeeded to the rights of Wormser, and thereafter, extended the main canal until it was approximately eight to ten miles long, and substantially completed. By mesne conveyances, Glass-Lindsay Land Company, a corporation, became the owner of the rights acquired by the Holland Irrigation Canal Company and thereafter did considerable work on one section of the canal. The Glass-Landsay Land Company was organized under the laws of the State of Montana with authority to purchase or construct an irrigation system and to sell, rent or otherwise dispose of water for the irrigation of lands lying immediately tributary to the main canal. In the action to determine the relative rights of parties to the use of waters of Big Timber Creek and its tributaries, one of the principal questions which arose in the case was whether or not a corporation which does not own, control or possess any land can make a valid appropriation of water for irrigation purposes, when organized for the purpose of selling or renting water to settlers. Mr. Justice Holloway, in disposing of this question, said:

> "To deny the right of a public service corporation to make an appropriation independently of its present or future customers and to have a definite time fixed at which its right attaches, would be to discourage the formation of such corporations and greatly retard the reclamation of arid lands in localities where the magnitude of the undertaking is too great for individual enterprise, if, indeed, it would not defeat the object and purpose of the United States in its great reclamation projects, for the United States must proceed in

making appropriations of water (from the non-navigable streams of this state at least) as a corporation or individual. (Rev. Codes, sec. 4846; United States v. Burley (C. C.), 172 Fed. 615; Burley v. United States, 179 Fed. 1, 102 C. C. A. 429).

It is clearly the public policy of this state to encourage these public service corporations in their irrigation enterprises, and the courts should be reluctant to reach a conclusion which would militate against that policy.

It is impossible to harmonize the decisions of the courts upon the subjects presented. Respectable authority can be found holding contrary to our view; but upon a consideration of our statutes, the history of the law of appropriation, and the public policy of this state, we base our conclusion that, as to a public service corporation, its appropriation is complete when it has fully complied with the statute and has its distributing system completed and is ready and willing to deliver water to users upon demand, and offers to do so. The right thus obtained may be lost by abandonment or nonuser for an unreasonable time (1 Wiel, sec. 569), but cannot be made to depend for its existence in the first instance upon the voluntary acts of third parties—strangers to its undertaking. The appellant here is a public service corporation (State ex rel. Milsted v. Butte City W. Co., 18 Mont. 199, 56 Am. St. Rep. 575, 32 L. R. A. 697, 44 Pac. 966; Gutierres v. Albuquerque L. & I. Co., 188 U. S. 454, 47 L. Ed. 588, 23 Sup. Ct. Rep. 338; 2 Wiel, sec. 1260), as were its immediate predecessors, while the original appropriators of the right claimed by appellant were private individuals.

If our statute does not by express terms, it does by fair implication, require that, at the time of taking the initial steps, the claimant must have an intention to apply the water to a useful or beneficial purpose. (Power v. Switzer, 20 Mont. 523, 55 Pac. 32; Toohey v. Campbell, above; Miles v. Butte Electric & Power Co., above; Smith v. Duff, above.) The law will not encourage anyone to play the part of the dog in the

manger, and therefore the intention must be bonafide and not a mere afterthought. (Nevada County & S. C. Co. vs. Kidd, 37 Cal. 282.)

The language of Mr. Justice Holloway to the effect that a right obtained by a public service corporation organized for the purpose of supplying water to landowners may be lost by abandonment or nonuser for an unreasonable time, is significant. The appropriation can be made by such corporation but if the purpose of its organization is carried out, the water can only be applied to a beneficial use by landowners obtaining water from such a corporation. Unless the water is applied to a beneficial use within a reasonable time it may be lost by reason of an abandonment or nonuser. Therefore, to recognize the right of such a corporation to make a valid appropriation, the Court must have recognized the right of the corporation to transfer the right to use such water and its irrigation facilities to one who can apply such water to a beneficial use. A transfer of such a right from such a corporation to the user of the water would certainly be a transfer of an easement in the water right and irrigation facilities.

In Brennan vs. Jones, 101 Mont. 550, 55 Pac. (2d) 697, it was held that where an irrigation company, such as the Teton Cooperative Reservoir Company in the instant case, conveyed to a water company supplying the needs of the town, 350 inches of water, and the needs of the town required only 65 inches, the irrigation company was not entitled to the unused portion of the 350 inches thus conveyed, but that the irrigation company

was obliged to turn such unused portion back into the stream from which said water was diverted for use of subsequent appropriators. In other words, the water conveyed by the irrigation company to the water company, consisting of 350 inches, was conveyed for a specific purpose. If such purpose did not require all of the 350 inches, the surplus not so required could not be used for any other purpose by the irrigation company. This rule cannot be upheld on any other ground than that the water conveyed by an irrigation company can only be used as an appurtenance for a particular purpose. The right to the use of the same being limited to the extent of the conveyance.

In the instant case, the By-laws of both the Teton Cooperative Reservoir Company and the Brady Irrigation Company are to the effect that each share of stock of these companies entitles the holder thereof to the use during the irrigation season of certain portions of the water rights and irrigation facilities of the corporations. We pointed out in our first Brief that these By-laws were the foundation for an enforceable contract, and since there is no limit as to time in which these By-laws may be enforced against the corporation by their stockholders, the issuance of a share of stock in effect amounted to a grant of the right to the use of the water appropriated and the irrigation facilities used in distributing such water.

The construction of the irrigation system of the Teton Cooperative Reservoir Company ordinarily would be too great an undertaking for an individual. The corporation

was therefore organized to serve many individuals. The same is true of the Brady Irrigation Company. The Brady Irrigation Company is merely an agency organized to distribute water to the landowners who own shares of stock in this company. When a share of stock of the Brady Irrigation Company is issued, this Company, by reason of the provisions of the By-laws set forth in full in the complaint, transfers an interest in the irrigation facilities and the water appropriated and distributed by means of the corporations. A share of stock of the Brady Irrigation Company is merely a link in the chain of the title of such owner to a portion of the water and irrigation facilities of the reservoir company. We submit that whether the landowners are stockholders of the Teton Cooperative Reservoir Company, or of the Brady Irrigation Company, their rights would be the same with respect to the water appropriated and the irrigation facilities constructed by the Teton Cooperative Reservoir Company.

In support of contention of counsel for appellee, counsel cite several Colorado decisions to the effect that a deed to land irrigated by means of ownership of stock in an irrigation company does not convey the grantor's water stock. The case of First National Bank of Longmont vs. Hastings, 7 Colo. A. 129, 42 Pac. 691, is one of the cases cited. This case was also cited in the Brief of counsel for the respondent at Page 76 of Vol. 88 of the Montana Reports, in the case of Yellowstone Valley Company vs. Associated Mortgage Investors, Inc., et al., 88 Mont. 73, 290 Pac. 255. Mr. Chief Justice Callaway,

who wrote the decision of the Supreme Court of Montana in the Yellowstone Valley Company case, in referring to these Colorado cases, said:

> "The doctrine announced in the foregoing cases is suited to our history and conditions and meets with our approval. Defendant's counsel cite decisions from the supreme court of Colorado to sustain the decision of the lower court, but with these we are unable to agree."

Therefore, the Colorado cases relied upon by appellee can have no application to the instant case for the reason that the Supreme Court of Montana has specifically disapproved of the rules announced therein.

It is contended by counsel for appellee that the appellant, Brady Irrigation Company, is estopped to enjoin an execution in this case and is entitled to none of the other remedies which might be granted under the Complaint, for the reason that it would be inequitable to grant any relief. Counsel contend in their Brief that since the stockholders, including the Brady Irrigation Company, have taken advantage of the benefits of the contract for enlarging the reservoir upon which the judgment of Winston Bros. Company is based should not be granted any relief because it would be inequitable. We have pointed out in our first Brief that the indebtedness to Winston Bros. Company was incurred by the Teton Cooperative Reservoir Company for the sole purpose of providing water for the Bynum Irrigation District. All the benefits derived from the enlargement of this reservoir were for the purpose of supplying water to the irrigation district. It is alleged in the Complaint that the By-

num Irrigation District, ever since the making and entry of the judgment was and is now bankrupt and hopelessly insolvent (R. p. 14). Therefore, in order to prevent the sale of the irrigation facilities under a Writ of Execution the Brady Irrigation Company would be compelled to pay the whole of the judgment. It is only a minority stockholder, yet in spite of the fact that it derived none of the benefits from the enlargement of the reservoir, it would be compelled to shoulder all of the burden. Certainly any enforcement of the judgment by a Writ of Execution would be inequitable, so far ts the Brady Irrigation Company is concerned.

In connection with the argument under the title of estoppel, counsel for appellant contend that the Federal Courts will not prevent a sale of property under a Writ of Execution issued on a judgment rendered by a State Court. The decision in the cases cited by counsel on page 57 of appellee's Brief were no doubt based on 28 U. S. C. A. 379, providing as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. pp. 720; Mar. 3, 1911, c. 231, pp. 265, 36 Stat. 1162.)"

The statute in question has been construed in a number of cases and it is generally held that a Federal Court having jurisdiction of the parties to a cause has the power as a court of equity upon grounds of equitable cognizance to enjoin the enforcement of a final judgment at law in a State Court upon the usual principles under which the

courts of equity will enjoin the enforcement of a judgment. The Firestone Tire & Rubber Co. vs. Marlboro Cotton Mills, 278 Fed. 816; Union Railway Company vs. Illinois Central Railway Company, 207 Fed. 745, certiorari denied, 231 U. S. 754, 34 Sup. Ct. 323, 58 L. Ed. 467.

In our first Brief, we pointed out that the District Court had jurisdiction of this cause, under the Declaratory Judgment Act, to declare the rights of the parties in this case. The District Court also had jurisdiction to quiet the title of the plaintiff to its stock in the Teton Cooperative Reservoir Company and to remove the cloud cast by the judgment. Therefore, relief by means of an injunction was not the only remedy available to the plaintiff in the instant case. The suit was properly before the District Court under two separate and distinct heads other than an injunction. Under these circumstances, the Court was not precluded from granting a preliminary injunction, if necessary, to preserve the rights of the parties, since the suit was properly before the Court. Southern Railway Company vs. Simon, 153 Fed. 234.

Since the District Court had the power to grant relief other than by injunction, it had the power to protect any judgment which it might render, such as to remove the cloud from the title of Brady Irrigation Company, or to declare the rights of the parties. Dietzsch vs. Huidekoper, 103 U. S. 496, 26 L. Ed. 497, Hickey vs. Johnson, 9 Fed. (2d) 498, Sand Springs Home vs. Title Guaranty and Trust Co., 16 Fed. (2d) 917.

In Ex Parte Simon, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429, it was said:

> "It would be going far to say that, although the Circuit Court had power to grant relief by final decree, it had not power to preserve the rights of the parties until the final decree should be reached."

Respectfully submitted.

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J. P. FREEMAN,
ERNEST ABEL,
Attorneys for Appellant,
Brady Irrigation Company.

No. 9251.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee.

PETITION FOR AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

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Filed ..... 1940.

..... Clerk.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

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Appellant,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee.

PETITION FOR AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, and THE HONORABLE JUDGES THEREOF:

Comes now WINSTON BROTHERS COMPANY, a corporation, Appellee in the above-entitled cause, in which judgment was rendered by this court on July 17, 1940, remanding the cause to the District Court, and within thirty days thereafter, files this its petition and brief in support of petition for rehearing, and for grounds thereof, respectfully represents:

I.

That the Appellate Court in basing its majority opinion on the public character of the service that the Reservoir Company performs to the land in the Bynum District (page 13 of printed opinion) has overlooked the fact that the service is not a service for use by, or actually used by the public generally, but only by a few individuals who own land in the district, and that the Bynum Irrigation District is not a governmental agency in the true sense, but only an association of landowners given power to levy assessments for the purpose of getting their lands under irrigation, and has not considered the Montana case of Buffalo Rapids Irrigation District v. Colleran, 85 Mont. 466, 279 Pac. 369.

ARGUMENT.

The Bynum Irrigation District is a district created pursuant to Section 7166 to 7264.18 Revised Codes of Montana of 1935. Briefly, the statutory provisions provide for the creation of a district by the District Court on petition of landowners. The Commissioners of the

District must be residents of it (Section 7170) and are elected by vote of the electors of the District (Section 7176). These Commissioners are vested with full powers of management of the District (Section 7174) including the right to levy an assessment for the payment of debts and expenses (Section 7232 ff.). They cannot issue bonds or levy an assessment for the payment thereof, without proper proceedings in the District Court (Section 7211).

As appears from *Thaanum vs. Bynum Irrigation District,* 232 Pac. 528, 72 Mont. 221, on page 223, the Bynum Irrigation District was organized to irrigate some 25,000 acres, amounting in all to some thirty-nine square miles, or only three square miles more than one township.

The owners of this amount of land are the "public" served by the Teton Cooperative, and the public character of the service, which this Court held prevents execution for payment of this judgment against the Teton Cooperative for construction and enlargement of the reservoir, is the furnishing of water to be used by the owners of a little more than one township of land.

We do not mean to decry the value of the water or the desirability of irrigation; but the only sense in which the "public" or the State is interested is in the increase in production and the increase in community welfare and purchasing power. So far as this feature is concerned, there is no sound practical distinction between the landowners in the Bynum Irrigation District and the shareholders in the Brady Irrigation Company.

Indeed, there are a number of ways in which the same result can be accomplished.

1. A private landowner may appropriate water for irrigation.

2. A group of water appropriators may build a ditch jointly and convey the water which they own to their lands.

3. The same group might form an association or corporation for the same purpose, and, if it owned water rights or the right to use water, the situation would be similar to that of Brady Irrigation Company.

4. A water user's association, having a contract with the United States Government and with its shareholders, would have the right to levy assessments (Section 7160 R. C. M. 1935).

5. A statutory irrigation district, like the Bynum Irrigation District, might be formed.

These are only some of the ways in which the same result—getting water on the land—might be accomplished.

The appropriation of water for irrigation of a private farm is a public use.

Montana Constitution Article III, Section 15; and *Ellinghouse vs. Taylor,* 52 Pac. 204, 19 Mont. 462, in which case the court said on page 464:

> "What real distinction is there, so far as the term 'public use' is concerned, between the benefit that results to a state from the reclamation by artificial irrigation of 160 acres of agricultural land owned by one or two persons, and the reclamation by the same means

of thousands of acres owned by many different persons living together in one subdivision of the state? We do not think there is any in principle. The reclamation of one small field by means of artificial irrigation promotes the development and adds to the taxable wealth of the state as well as the reclamation by the same means of a number of fields. The only difference is the extent of the benefit."

Section 7201 of the Revised Codes of Montana of 1935, provides that the use of all water for irrigation of lands in an irrigation district is a public use, but this is equally true of an individual appropriation. As stated in the Ellinghouse case, the question is merely one of degree.

As in every case, the particular facts of the particular case must decide. It is respectfully submitted that the furnishing of water for the irrigation of twenty-five thousand acres, regardless of the form it takes, is not service of the public character of sufficient importance to warrant the holding that its property is exempt from execution, particularly in the face of the statutory law and the Montana decisions which will be discussed in Subdivision II of this petition.

Before passing to that subject, however, we call the attention of the court to three cases bearing directly on the point now under discussion. The first is *Board of Directors vs. Peterson,* 4 Wash. 127, 29 Pac. 995, where on page 997 of the Pacific Reports the court says:

"The improvement contemplated in the creation of the district is a local one, in the interest of property benefited, and has nothing whatever to do with the taxing power."

The second case is *Board of Directors of Payette-Oregon Slope Irrigation District vs. Peterson,* 64 Ore. 46, 128 Pac. 837. The serious question there presented was as to the qualifications of electors within the district. In the course of considering this question it became important to determine the nature of an irrigation district, as, if the organization was municipal, the qualifications of its electors would be certain ones prescribed by the Constitution. The court said on page 839:

> "On the contrary, in the irrigation districts provided for here only the land is benefited or burdened, and only the landowner has any interest in the choice of its officers, or is in any way concerned in their acts. The management of the district affairs is solely of the irrigation project in the private interest of the landowners, and therefore the apparent reason for and purpose of the requirements of section 2, art. 2, as applicable to elections in municipal or quasi municipal corporations, fails in the case of the irrigation districts."

This latter case was cited with approval by the Supreme Court of Montana in *Buffalo Rapids Irrigation District vs. Colleran,* 279 Pac. 369, 85 Mont. 466. The case is cited on page 479 and in this connection the court says commencing on page 478:

> "An irrigation district is neither supported by appropriation of public funds, by taxation, or by private donation. True, funds for the maintenance and operation of the district are raised by assessments levied against the property within the district, but these levies are in the nature of special assessments for local improvements (In re Valley Center Drain District, 64 Mont. 545, 211 Pac. 218), entirely distinct from general taxes for state, county, school district, and municipal purposes (Lainhart v. Catts, 73 Fla. 735, 75 South.

47); they may even be levied against public property in spite of the constitutional exemption (State ex rel. City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638; City of Kalispell v. School District, above); and no part of the revenue derived therefrom reaches the coffers of the state or its political subdivisions organized for governmental purposes.

Further, while it is declared that irrigation districts are created to promote the welfare of the state, the state as a whole, the counties and school districts within which such districts may lie are benefited only incidentally by reason of the increased valuations placed on the lands within the districts because of the special improvements made thereon and the increased prosperity of the owners of the land. The direct benefit accrues to the land improved and the owners thereof. (Boards of Directors of Payette Oregon Irrigation District v. Peterson, above). *Irrigation districts are not created with a view to benefit the state or to organize a corporation for the discharge of governmental functions in addition to, or in aid of, the usual governmental departments or agencies, but in order to promote the material prosperity of the few owning property within their boundaries just as truly as are manufacturing plants established or mines and oil wells developed. In so far as each of these projects bring into being new sources of revenue to the state, they promote the welfare of the state, but the mere production of additional values or property does not, in itself, warrant the exemption of the property from taxation, so long as that production is accomplished for private gain.*" (Emphasis supplied).

That case will be more fully discussed in the next subdivision of the brief as it involves exemption from taxation of property of an irrigation district. But it is to be noted that what is said in the above quotation,

and particularly the portion emphasized, directly supports the arguments made under this subdivision and removes the property of an irrigation district from any rule exempting property from execution because of its importance to the public generally, or because it is property of a governmental agency used in governmental affairs.

II.

That the Appellate Court, in basing its majority opinion on the proposition that although not specifically exempted by statute, the property in question was nonetheless exempt for the reason that,

> "To argue that the state actually intended to exempt property used by the counties and cities and towns from foreclosure of liens and to permit foreclosure upon property belonging to the state or used by the sovereign authority of the state for public purposes would be extending the meaning of 10703 Rev. Stat., supra, far beyond any possible remedial purpose sought to be effected by its enactment. In view of the extraordinary effect such a construction would have upon the powers of the state to protect its own property and activities, we can but arrive at the conclusion that no such construction was ever intended and that the legislature was laboring under some misapprehension that the sovereign power referred to herein and which by implication is reaffirmed by 10703 R. S. M., did not extend to counties and cities and towns." (See page 12 of printed opinion of this Court)

did not take into consideration certain Montana statutes and decisions not called to its attention for the reason that the proposition was not argued in the prior proceeding.

ARGUMENT.

These statutes and decisions are as follows:

1. Although property of a county is expressly exempt from execution, Section 4450 provides for the payment and collection of judgments against counties.

2. Sections 5084 and 5085 cover the same situation with regard to cities and towns.

3. The State of Montana may not be sued without its consent, (State ex rel. Freebourn vs. Yellowstone County, 108 Mont. 21 at 27, 88 Pac. (2d) 69) and hence no judgment is possible unless the state has consented to be sued. Provision for allowance or rejection of claims against the state by its Board of Examiners is made by statute. (Sections 238 ff.) In case of claims for which no appropriation is made, the Board of Examiners must audit the claim and if they approve it, transmit it to the Legislative Assembly with a statement of their approval. (Section 241.)

The opinion of this court indicates on page 12 that it is the opinion of this court that in connection with the enactments with reference to exemption from execution, the Legislature had not covered the situation sufficiently to protect the State from having a levy of execution against its property.

An examination of the statutes shows that the situation is thoroughly covered. The Legislature had no occasion to mention state owned property in the exemptions, for there was adequate provision made for the payment of claims against the State, and no possibility

of any judgment issuing on which an execution could be based. The enactments as to the payment of claims against counties and cities and the payment of judgments against them show a determination on the part of the Legislature that they should not hide indefinitely behind the statutory exemption from execution.

The legislation, taken as a whole, shows a well-rounded, complete and definite program on the part of the Legislature to exempt certain public properties in cases where the agency could be sued, but to make adequate provision for payment of any judgment that might be obtained against such agency, together with adequate provision for payment of just claims against the state, even if it were not subject to suit. The Legislature did not, directly or by any reasonable implication, exempt the property of an irrigation district, and it must always be borne in mind that we are not now concerned with the property of an irrigation district but with the property of a private corporation, a majority of the stock of which is held by an irrigation district.

4. The case of *Buffalo Rapids Irrigation District vs. Colleran, 85 Mont. 466, 279 Pac. 369*, cited above, is closely analagous on this feature of the case. Had it been anticipated that the case would take the turn which it did, this case would have been called to the attention of the court in the brief on appeal. It appears from the opinion in that case, that the irrigation district had acquired title to certain land within the district because of the failure of the owner of the land to pay assessments. The

question to be considered by the court is stated as follows on page 469 (reference to pages in this case will refer to the Montana Report):

> "Has Custer County the power to assess and levy a tax upon the land of the plaintiff, the plaintiff being an irrigation district organized under the laws of the State of Montana?"

The court stated that the answer was to be found in the constitutional and statutory provisions on the subject. The Legislature had undertaken, by what is now section 7209, to exempt from taxation the bonds issued under the Act for irrigation districts, and rights of way, ditches, flumes, etc., belonging to any irrigation district.

In the Buffalo Rapids case the court stated that an irrigation district was "a public corporation for the promotion of the public welfare." It then continued as follows:

> "But the mere fact that such a district is a public corporation created for the purpose stated does not neccessarily exempt its property from taxation; if such property is to be exempted, it must be by virtue of the express pronouncement of the Constitution or legislative declaration permitted by the Constitution." (Page 470).

The court then quoted the provisions of the Constitution, Article XII, section 2, which provides that "the property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries" should be exempt from taxation. Special attention is called to this paragraph of the opinion which

is the second full paragraph on page 470. After quoting this provision the court adds "that is, public property." And the court then says "as to this class the provision is self-executing and mandatory." The second provision as to the exemption in the Constitution related to charitable and educational societies which was not thereafter seriously considered. The court then continued on page 470:

> "It will be noted that 'public corporations' are included in neither of these classes, unless, as contended by counsel for the plaintiff, irrigation districts, as public corporations, fall within the designation 'municipal corporations,' *or are such component parts of the state that it may be said that their property is the property of the state.* The very fact that the framers of our Constitution wrote into the fundamental law an exemption of the public property enumerated is recognition of the principle that, without such exemption, it would be subject to taxation (City of Kalispell v. School District, 45 Mont. 221, Ann. Cas. 1913D, 1101, 122 Pac. 742), and therefore the rule 'expressio unius est exclusio alterius' applies." (Emphasis supplied).

In discussing these statutes and the rules of statutory construction, the court says on page 471:

> *"Provisions for exemptions must be construed strictly; nothing is to be implied (Cruse v. Fischl, above); this rule applies to exemptions of public as well as private property* (Sanitary District v. Gibbons, 293 Ill., 519, 127 N. E. 691), and anyone seeking immunity from taxation must show that his property belongs to a class which is specifically exempted (City of Kalispell v. School District, above)." (Emphasis supplied).

On page 472 it is stated that an irrigation district is

not a state, county, city, town, or municipality, the court saying:

> "Where, then, does the property of an irrigation district fit into our constitutional provision so as to entitle it to exemption? It is neither the state, a county, city or town (Thaanum v. Bynum Irr. Dist. 72 Mont., 221, 232 Pac. 528), and, in that opinion, it is emphatically declared that such a district is not a 'municipality,' for the term is synonymous with 'municipal corporation,' 'and in this state only incorporated cities and towns are municipal corporations (Hersey v. Neilson, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30)."

After pointing out on page 473 that a word or phrase may have different meanings as it is employed in different connections, the court says:

> "The plaintiff district is entitled to have its property exempted only if, under the above rules, it can be said it clearly comes within the term 'municipal corporations,' *or that it is such a subdivision, institution or department of the state as to constitute its property the property of the state,* or that, under some appropriate designation, within the second class mentioned in the constitutional provision, its property has been exempted by statute." (Emphasis supplied).

After discussing several cases from other jurisdictions, the court came to the following conclusion on page 476:

> "It cannot be said that the term 'municipal corporation' is used in any different sense in section 2, Article XII, above, than is its synonymous term 'municipality' in section 1 of Article XIII, considered in Thaanum v. Bynum Irrigation District, above, and on this authority, and for the further reasons hereinafter given, *we hold that the property of an irrigation district is not exempt from taxation under the specific provision*

exempting the property of municipal corporations." (Emphasis supplied).

The court then turns to the other contentions of the plaintiff which were in effect that the irrigation district is an integral part of the state so as to render its property exempt from taxation on the theory that it is in fact property of the state. This argument is very similar to the theory of this court in its decision that the property was exempt from execution, although not specifically stated to be exempt by the statute. As we read the opinion of this court, it is based on the proposition that the irrigation district is such a governmental agency that even though it is not specifically exempted, it must be held to be exempt because it is in effect the property of the State of Montana. The Supreme Court of this state dealt as follows with such an argument on page 476:

> "*But neither the statute nor the opinion cited conveys the idea that an irrigation district is such an integral part of the state as to render its property exempt from taxation on the theory that it is in fact the property of the state; on the contrary, the enactment discloses the legislative intent that only such property of an irrigation district as is used for governmental purposes should be exempt, and further, had the legislature had in mind that the property of such a corporation came within the phrase 'property of * * * the state,' that body would not have felt called upon to enact the statute, for as to such property the constitutional provision is self-executing, and the decision questions the power of the legislature to exempt such property.*" (Emphasis supplied).

And on page 477 the court said:

"It would seem that, in order to come within the rule which will permit the court to consider the property of a public corporation the property of the state for the purpose of exemption from taxation, *such corporation should be so closely engrafted upon the state as to in fact exercise governmental functions and be supported, directly or indirectly, by the state.*" (Emphasis supplied).

Another feature of the Colleran case deserves special attention. In 1909 the Montana Legislature passed an act, which is now Section 7209 of the Revised Codes, which provides in part that

" 'the bonds issued under the provisions of this Act, rights-of-way, ditches, flumes, pipe-lines, dams, water-rights, reservoirs, and other property of like character, belonging to any irrigation district, shall not be taxed for state, county, or municipal purposes.' "

The Montana Supreme Court, on page 476 of the Colleran case, after quoting the above language, said

"Of this section Mr. Justice Holloway, speaking for the court in Crow Creek Irr. Dist. v. Crittenden, 71 Mont., 66, 227 Pac. 63, had this to say: 'Whether the legislature had the authority to declare such an exemption may be questioned, but no one can be in doubt that it was dealing with an irrigation district as a part of the state itself rather than as an enterprise fostered by the state,' and it is there held that such a district is a subdivision of the state within the meaning of section 4893, Revised Codes of 1921, relieving subdivisions of the state from the payment of recording fees."

It is of this statute that the court was speaking when it stated on pages 476 and 477:

"But neither the statute nor the opinion cited conveys the idea that an irrigation district is such an integral part of the state as to render its property exempt from taxation on the theory that it is in fact the property of the state; on the contrary, the enactment discloses the legislative intent that only such property of an irrigation district as is used for governmental purposes should be exempt, and further, had the legislature had in mind that the property of such a corporation came within the phrase 'property of * * * the state,' that body would not have felt called upon to enact the statute, for as to such property the constitutional provision is self-executing and the decision questions the power of the legislature to exempt such property. But, whether that statute is valid or not, it cannot avail the plaintiff here, as the property in question is not included in the statutory exemption."

The logic of the reasoning of the court seems unanswerable. If the legislature had regarded the property as property of the State, it never would have passed the Act. Moreover, doubt as to the constitutionality of Section 7209, so far as it exempts the specified property of the District, was voluntarily expressed by the Supreme Court in both the Crow Creek and Colleran cases, which clearly shows that the court did not consider the dams, reservoirs, and other enumerated property of the District, to be state property or public property.

Applying the analogy to the case at bar, only property specifically exempted by statute is exempt from execution on a judgment. (Section 9424). State property is not mentioned, nor should it be, for the State may not be sued, hence no judgment for damages can be recovered against it. There is no prohibition in the statutes of a

suit against an Irrigation District, and no exemption in the statutes of its property.

The Colleran case is direct authority for the proposition that, apart from the statute, there could be no exemption of any property of a District from taxation. The same principles apply in the present case; not being exempt by statute, and being, as our Supreme Court has said, created "in order to promote the material prosperity of the few owning property within their boundaries" there is no reason to hold the property of irrigation districts exempt from execution, and, *a fortiori,* even less to hold property of the Teton Cooperative exempt.

We point out again that the statutes of Montana provide that only property specifically exempted shall be exempt from execution (Section 9424), and that this property is not so exempt (Section 9427); that this principle applies to public property as well as private property, (Colleran case, p. 471); that the exemption statute declares the policy of the State that no property is exempt from execution on a judgment recovered for its price (Section 9427), and that the judgment in this case is in effect such a judgment.

We respectfully submit that, in the light of the decisions and statutes referred to, the holding of this court that this property may not be sold on execution, at least so far as it is connected with Bynum Irrigation District, trenches very close upon judicial legislation in a situation where adequate provision has been made by the Legislature and its policy expressly declared to be that

of limiting property exempt from execution to property specifically so exempted.

This court has properly held in *Smith Engineering Co., v. Rice,* 102 Fed. (2d) 492, that where the common law is repugnant to Montana statutes, it does not exist in Montana. In the case at bar this court held "that the exemption statute does not act to declare the law as to foreclosure of liens upon the property involved in this case" (opinion page 12), but we submit that the statutes and decisions herein referred to compel a different conclusion.

Moreover, even if the court should hold that, despite absence of statutory exemption, state property cannot be sold, the Colleran case is direct authority that property of an Irrigation District is not such property.

We sincerely feel that the dissenting opinion is correct and that the statutory law of the State of Montana must govern. What has been said above in this brief clearly distinguishes this situation from the case of *Northern Pacific Railroad Company v. Schimmell,* 6 Mont. 161, 9 Pac. 889, which is based upon the proposition that the jury had found that the safe was a necessary part of the equipment for the purposes of the business, and that the franchise having been given by act of Congress making the road a military and post road, property necessary to its successful operation could not be seized.

Moreover, it is pointed out in the dissenting opinion, it was decided prior to the enactment of section 10703.

It is respectfully submitted that the considerations set forth in this petition warrant a rehearing.

WHEREFORE, upon the foregoing grounds and upon the basis of the argument hereinabove made, it is respectfully urged that this petition for rehearing be granted, and that upon further consideration the judgment of the lower court may be affirmed.

Respectfully submitted.
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* * *

STATE OF MONTANA,
COUNTY OF CASCADE. } ss.

JOHN D. STEPHENSON, being first duly sworn upon oath deposes and says:

That he is one of the attorneys for the appellee-petitioner named in the foregoing petition; that no officer of said appellee petitioner is within the County of Cascade where affiant resides and where this verification is made, and that he therefore makes this verification for and on behalf of said petitioner. That he has read the foregoing petition, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JOHN D. STEPHENSON.

SUBSCRIBED AND SWORN TO before me this day of August, 1940.

MARGARET C. INNES,
Notary Public for the State of Montana. Residing at Great Falls, Montana. My commission expires August 4, 1942.

* * *

CERTIFICATE OF COUNSEL

I, the undersigned, do hereby certify that I am a counsel in the above-entitled cause for the above-named petitioner, WINSTON BROS. COMPANY, a corporation; that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

JOHN D. STEPHENSON.